JUSTICE ACCORDING TO LAW,

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JUSTICE ACCORDING TO LAW.[a]

I. Justice Without Law.[1]

Two antagonistic ideas, the technical and the discretionary, may be seen at work throughout the administration of justice. These might well be called the legal and the non-legal element in judicial administration. With entire accuracy they may be called the legal and the pre-legal element, since the latter represents the type of administration of justice which obtains prior to the administration of justice according to law, and it still obtains where there is no law governing a cause[2] and where rules of law are impossible or inexpedient. For we must bear in mind that law is not logically essential to the administration of justice.[3] Justice may be administered according to the will of the individual who administers it for the time being, or it may be administered according to law. Probably it is true that even in the earliest and rudest justice the will of the judge is not exercised entirely as such, wholly free from the constraint of acknowledged rules of action or principles of decision. On the other hand it is equally true that in no legal system, however minute and detailed its body of rules, is justice administered wholly by rule,

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[a]The substance of this paper will appear in a forthcoming book to be entitled "Sociological Jurisprudence."

[1]Salmond, First Principles of Jurisprudence, 89-90; Salmond, Jurisprudence, § 7; Markby, Elements of Law, § 201.

[2]See Markby, Elements of Law, § 26; Gray, Nature and Sources of Law, chap. 5; Geny, Méthode d'interprétation, §§ 145-150; Zitelmann, Die Gefahren des BGB. für die Rechtswissenschaft, 19; Danz, Rechtssprechung nach der Volksanschauung und nach dem Gesetz, § 6. The legislative rôle of the judge in making law for the case in hand, which may lead to a rule for the future, is now coming to be recognized everywhere. Obviously a personal element is more or less involved in the first instance. "It is told that the Romans, friends of pious frauds as well as of juridical fictions, knew how by adroit maneuvres to obtain favorable auspices from the sacred chickens. Has it not been said that 'principles' and 'theories' are the sacred chickens of the modern magistrate? Not without some exaggeration. But it is evident that the personality of the expounder may manifest itself more freely in the ample discussion of principles than in the application of determinate legislative provisions on all fours." Cruet, La vie du droit, 60.

[3]"All that the judge absolutely requires is authority to settle all disputes which come before him. * * * A tribunal altogether without law, though scarcely within our experience, is not a contradiction." Markby, Elements of Law, § 201. "Law is not an essential element in the administration of justice. We cannot have the former without the latter, but we may have the latter without the former." Salmond, First Principles of Jurisprudence, 89.

without any recourse to the will of the judge and his personal sense of what should be done to achieve justice in the cause before him. Both elements are to be found in all administration of justice. But sometimes, as in oriental justice, the one element greatly preponderates; at other times, as in Europe and America of the nineteenth century, the other element all but holds the whole field. For the moment it is enough to insist that administration of justice without law is perfectly conceivable; that it has taken place and that it still takes place to some extent in the most developed systems. The most conspicuous example is oriental justice.[4] Administration of justice by the king in person is of this type.[5] Martial law, so-called, is another example.[6] Remnants of this direct application of the will to the solution of controversies are to be found in legislative and executive justice in modern states, and it has a recognized place in judicial justice under the name of discretion along the border line between law and morals. Before the law, then, we have justice without law, and after the law and during

[4]"By the custom of the East, any man or woman having a complaint to make, or an enemy against whom to be avenged, has the right of speaking face to face with the king at the daily public audience. * * * The privilege of open speech is of course exercised at certain personal risk. The king may be pleased and raise the speaker to honour for that very bluntness of speech which three minutes later brings a too imitative petitioner to the edge of the ever-ready blade." Kipling, The Ameer's Homily (In Black and White, Outward Bound ed. 204). In the stories of Harun al Raschid in the Arabian Nights, one wrongdoer who tells a clever story will go free, while the severest penalty is inflicted on the next who adds dullness to no greater crime. This is oriental justice at its worst. For an example showing a better side of what is still personal as distinguished from impersonal justice, see Wigmore, The Legal System of Old Japan, 4 Green Bag, 403.

[5]Henry II was a lawyer as well as an administrator, and the personal justice to be had before him was the best of its class. It is suggestive, therefore, to observe the extent to which politics dictated his decisions and desire to avoid conflict with the pope brought about compromises rather than judgments: also the obvious partisanship of the tribunal, the giving a private audience to one litigant and putting out of court the learned clerk who suggested points on the side of the other party. See Pollock and Maitland, History of English Law (1st ed.) I. 135-137.

[6]"Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is in truth and reality no law." Blackstone, Commentaries, I. 413. "Martial law is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all." The Duke of Wellington, Hansard's Debates, 3rd series, CXV, 881. "Martial law is neither more nor less than the will of the General who commands the army. * * * In other words, the entire population of the country, within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge and executioner." *In re* Egan (1866) 5 Blatchford, 319, 321.

the evolution of law, we still have it as a non-legal element under the name of discretion,[7] or natural justice,[8] or equity and good conscience,[9] or permissible relaxation of rules with reference to the requirements of individual cases under certain circumstances.[10]

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[7]"Discretion means a power or right conferred upon them by law, of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others." Judges *v.* People (N. Y. 1837) 18 Wend. 79, 99. "The discretion of a judge is the law of tyrants. It is always unknown. It is different in different men. It is casual and depends upon constitution, temper, and passion. In the best it is oftentimes caprice. In the worst it is every vice, folly, and passion to which human nature is liable." Lord Camden, quoted by Fearne, Contingent Remainders (10th ed.) 534, *n. t.*

The *aequitas* of civilians (*Billigkeit*) is a discretion in the application of legal rules. Suarez, De Legibus, Lib. II, cap. VI, §§ 5-13. "To speak first of equity, * * * it should be known that the words 'equity' or 'the equitable' are used * * * in connection with those things which the rule of law does not define exactly but leaves to the discretion of a good man." Grotius, De Aequitate Indulgentia et Facilitate, cap. I, § 2. In this sense, Grotius defines equity as "the correction of that wherein the law is deficient because of universality." De Iure Belli et Pacis, II, 26, 1. Blackstone has this in mind also when he says: "Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge." Commentaries, I, 61-62.

"It appears to me that a Superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled." Lord Watson, in Grahame *v.* Swan (1882) L. R. 7 A. C. 547, 557.

[8]*E. g.*, in the Austrian Civil Code, Introduction, §§ 6-8, it is provided that if a rule of law is not at hand, the judge shall decide in accordance with the rules of law for similar cases and according to the principles for analogous rules of law, and if these do not suffice for a solution, he shall decide "according to the principles of natural law." Compare also section 3 of the Italian Civil Code of 1866. In the conferences on the French Civil Code, we are told that in the absence of express rule of law the judges should be governed by "the rules of equity which exist in the maxims of natural law, universal justice and reason." Observations of le Tribun Faure upon art. 4. It should be remembered that these codes thought of the judges as simply deciding the particular case, not as laying down any rule for the future. See French Civil Code, art. 5.

[9]"It is undeniable that courts of equity do not recognize and protect the equitable rights of litigant parties, unless such rights are, in pursuance of the settled juridical notions of morality, based upon conscience and good faith." I Pomeroy, Equity Jurisprudence, § 385. In such cases as refusal to enforce specifically a hard bargain, the margin of discretion is still considerable, despite the nineteenth-century tendency to reduce the discretion of the chancellor to a minimum.

[10]See *supra*, note 7. For modern discussions of this *aequitas* (*Billigkeit*), see Toullier, Droit civil Français, I, § 149; Geny, Méthode d'interprétation, § 163; Albrecht, Die Stellung der römischen Aequitas in die Theorie des Civilrechts; Bekker, Ueber die römische und die moderne Aequitas, Jahrbuch der internationale Vereiningung für vergleichende Rechtswissenschaft und Volkswirthschaftslehre, I, 337; Schmölder, Die

or equitable application of law, of "free search for the right."[11]

Legal history shows a constant movement back and forth between wide judicial discretion on the one hand, and strict confinement of the magistrate by detailed rules upon the other hand. From time to time more or less reversion to justice without law becomes necessary in order to bring the administration of justice into touch with new moral ideas or changed social or political conditions.[12] Gradually the ideas introduced in these periods of reversion, which are also periods of growth, result in a new body of fixed rules. In time the modes of exercising discretion become fixed, the course of judicial action becomes uniform, and presently an extreme of detailed rule, mechanically applied, has succeeded to an extreme of judicial freedom.[13] But because the course of legal evolution has been away from wide discretion and toward a scientific body of rules, it is not to be inferred that the discretionary element is destined to ultimate extinction. Some parts of the administration of justice obstinately resist the attempt to reduce them completely to the domain of law.[14] We think of some of these,

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Billigkeit als Grundlage des bürgerlichen Rechts; Windscheid, Lehrbuch des Pandektenrechts, I, § 28. For theoretical discussions, see Ahrens, Cours de droit natural (8th ed.) I, 177; Lasson, Rechtsphilosophie, 238-239; Gareis, Science of Law (Kocourek's transl.) § 6; Pulszky, Theory of Law and Civil Society, § 174; Stammler, Theorie der Rechtswissenschaft, 134-136; Bril, Billigkeit und Recht, Archiv für Rechts und Wirthschaftsphilosophie, III, 526. Commentators on the German Civil Code recognize a type of "elastic legal rules" in which this margin of discretion is permissible. Crome, System des deutschen bürgerlichen Rechts, I, § 13.

[11]See Pound, The Enforcement of Law, 20 Green Bag, 401; Pound, The German Movement for Reform in Legal Administration and Procedure (with full bibliography), Bull. Comp. Law Bureau Am. Bar Ass'n, I (1908) 31; Ehrlich, Freie Rechtsfindung und freie Rechtswissenschaft; Gnaeus Flavius (Kantorowicz, Der Kampf um die Rechtswissenschaft; Fuchs, Recht und Wahrheit in unserer heutigen Justiz; Oertmann, Gesetzeszwang und Richterfreiheit; Rumpf, Gesetz und Richter; Brütt, Die Kunst der Rechtsanwendung; Gmelin, Quousque? Beiträge zur soziologischen Rechtsfindung; Kantorowicz, Rechtswissenschaft und Soziologie, 11 ff.; Geny, Méthode d'interprétation; Van der Eycken, Méthode de l'interprétation juridique.

[12]See Pound, Spurious Interpretation, 7 COLUMBIA LAW REVIEW, 379; Clark, Practical Jurisprudence, 340-379; Pollock, The Expansion of the Common Law, 107-138.

[13]See my paper, The Decadence of Equity, 5 COLUMBIA LAW REVIEW, 20.

[14]The law as to fraud is an instructive example. After courts had worked out an elaborate scheme of "badges of fraud" whereby transactions were judged by a detailed system of hard and fast rules, it became necessary by statute to make fraud "a question of fact," that is, to make it a question to be determined by the good sense of the tribunal applied to the facts of each case. Ariz. Rev. St. § 2707; Cal. Civ. Code, § 1574; Col. Rev. St. § 2674; Dist. Col. Civ. Code, § 1120; Idaho Rev.

in our law, as presenting cases peculiarly for the jury and conceal the breakdown of our elaborate system of legal rules in these cases by making it appear that no more than questions of fact have been involved. Other parts of the administration of justice, on the other hand, not only prove susceptible of complete reduction to legal rules, but resist attempts to deal with them in any other way.[15] Salmond's remark that "the proportion between the sphere of law and that of judicial discretion is not fixed but variable,"[16] is true as a statement of legal history, and is no doubt true abstractly in the sense that the conditions which make for preponderance of the one element or the other vary with time, place and people. Yet it is also true that experience is pointing, if not to a true proportion between them, at least to a partitioning of the field of judicial activity between them, and that the problem is gradually settling down to one of the respective fields of two necessary elements in the judicial administration of justice.

In spite of its obvious incompatibilty with the social interest in general security and in spite of experience of its ill workings when applied to the securing of social interests through the criminal law, justice without law is much hankered after by the layman.[17] It

Codes, § 3171; Ind. Burns' Ann. St. § 7483; Mich. Comp. L. § 9530; Minn. Rev. L. § 3500; Mont. Rev. Codes, § 4980; Neb. Comp. St. Ch. 32, § 20; Nev. Comp. L. § 4792; N. Y. Pers. Prop. Law, § 26; N. D. Rev. St. § 6640; Or. Ann. Codes & St. § 5511; S. D. Civ. Code, § 2371; Wash. Rem. & Bal. Code, §§ 2292, 2303; Wis. St. § 2323. As to "badges of fraud," see Bump, Fraudulent Conveyances, §§ 41-68; Waite, Fraudulent Conveyances and Creditors' Bills, §§ 224-244.

[15]The most obvious case is the law of property in land, particularly the rules as to the construction and effect of instruments creating interests in land. Even the ordinary process of judicial law-making works badly here. See Gray, General and Particular Intent in Connection with the Rule against Perpetuities, 9 Harv. Law Rev. 242, 246; Rogers *v.* Goodwin (1870) 2 Mass. 475; Goodell *v.* Jackson (N. Y. 1823) 20 Johns. 693; Harrow *v.* Myers (1868) 29 Ind. 469, 470; Rockhill *v.* Nelson (1865) 24 Ind. 422, 424; Smith *v.* McDonald (1871) 42 Cal. 484.

[16]First Principles of Jurisprudence, 89.

[17]See, for example, Roger North's comparison of Turkish and English Law, Life of Sir Dudley North, 43; the proposition of Benjamin Austin for lay referees to take the place of courts and that parties should appear in person or by any friend whether attorney or not before such referees, Honestas, Observations on the Pernicious Practice of the Law, 25 ff. (written 1786, published 1819); Lafcadio Hearn's eulogy of the administration of the old Japanese Law, in which "judgment was decided by moral common sense rather than by legal enactment or precedent," Japan, An Attempt at Interpretation, 384-385; the conventional commendations of the administration of justice by lay magistrates in Colonial America, *e. g.*, 40 Am. L. Rev. 436-437 (but see the observations of Parker, C. J., in Pierce *v.* State (1843) 13 N. H. 536, 557; also Warren, History of the American Bar, 136, 137); Professor Jenks' argument for lay judges, Governmental Action for Social Welfare, 214-216. *Cf.* Parsons, Legal Doctrine and Social Progress, 37-38. "If there is such a thing as

is true, this hankering is more pronounced after a long era of over-minute rules such as our law has been passing through. But even the American colonists, who from bitter experience knew the relation of hard and fast legal rules to liberty, were wont to pursue an ideal of a rude natural justice dispensed without rule by a jury or by a plain man.[18] Extravagant powers are conceded to juries in many jurisdictions because the application of rough standards of justice and the appeal to the emotions involved in these powers are strongly approved by the public. The strong-willed common-sense magistrate, who, on occasion, knows how to set the law aside, is always popular. There are other reasons for this than intrinsic advantages of such an administration of justice. One reason is a wide-spread popular belief that any one is competent to administer justice; that it is an easy task in which the opinion of the layman, formed for the one case, is as good as the opinion of the lawyer, based upon experience of many causes and study of the principles of decision therein. Another is, perhaps, that exaltation of incompetency and distrust of special competency in special fields which seems to be an unhappy by-product of democracy.[19] Another is a notion of the popular will as the fountain of justice; a notion of the sovereign people administering justice for each case by exercise of the sovereign will, as the king did in primitive society. In this view, we get an approximation to popular justice in judicial institutions which reflect accurately the popular impulse of the moment.[20] Still another reason may be that the public are able to appreciate a concrete case better than an abstract principle. But with all deductions upon these grounds, there are certain advantages in a free scope for magisterial discretion.

For one thing, that the public believe justice is done is no

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right in the world, let us have it *sine fuco.* * * * Why comes it not forth in its own dress? Why doth it not put off *law*, and put on *reason*, the mother of all just laws?" Warre, The Corruption and Deficiency of the Lawes of England (1649).

[18]Warren, History of the American Bar, 3, 105, 140. In Rhode Island there was no charge to the jury till 1833. Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153.

[19]See Faguet, The Cult of Incompetence.

[20]Poindexter, The Recall of Judges, Editorial Review, November, 1911; Roosevelt, The Right of the People to Rule, Senate Document No. 473 (1912); Gompers, Labor's Reasons for the Enactment of the Wilson Anti-Injunction Bill, Senate Document No. 440 (1912). See the remarks of Judge Thompson upon the doctrine in some states that jurors are judges of the law. Trials, II, §§ 2134-2136.

less important than that it be done with the greatest possible precision.[21] But justice according to magisterial good sense, unhampered by rule, is more apt to accord with the moral sense of the community, when administered by a strong man, than justice according to technical rule. And one function of the administration of justice is to adjust the relations of individuals to each other so as to accord with the general moral sense. Rules in many of these matters are needed to guide the weak judge and to save us from his lack of will and lack of judgment. But these same rules may serve only to hamper the strong judge and to prevent application of the full measure of his good sense and sound judgment to the case in hand. Such a magistrate may know how to take account of some things, which could not be included in a rule, which nevertheless may be more or less controlling in the individual cause. Moreover, if, as some assert, mercy is part of justice,[22] it is obviously no part of law, which, as Aristotle puts it, "is intelligence without passion."[23] In matters of vital human concern, especially in appraising human conduct, this complete separation of the emotional element cannot be achieved.[24] The most that we can do is to confine it to its proper sphere of questions of conduct and of the moral quality of acts and to insist upon divorcing it utterly from questions of the delimitation of the interests of personality and of substance which the law exists to secure. Wherever, therefore, within proper limits this element must be admitted, we must admit justice without law. Finally, some controversies are too small to admit of rules. They must be settled, but settlement by the elaborate machinery of legal rules defeats its own end because the trouble and expense of working the machinery is too great to make it practicable to resort thereto. Hence the plain common-sense man hampered by few rules has long been our ideal for petty causes. One of the chiefest of the genuine grievances of the American people with respect to American law is the breakdown of our system of administering justice

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[21] *Cf.* Lord Herschell's remark to Sir George Jessell: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it." Atlay, Victorian Chancellors, II, 460. "Discredited justice is almost as bad as veiled injustice." Chalmers. Trial by Jury in Civil Cases, 7 Law Quart. Rev. 15, 20.

[22] Lorimer, Institutes of Law (2nd ed.) 314.

[23] Politics, III, 16.

[24] See Chalmers, Trial by Jury in Civil Cases, 7 Law Quart. Rev. 15.

in such causes through failure to provide the type of magistrate to whom alone this royal power may be wisely entrusted.[25]

So far, then, as the function of law is merely to adjust controversies peaceably, administration of justice without law has its place. But this is no more than a small part of the function of law. Such an administration of justice at best only partly protects the social interest in general security. The social interest in the security of transactions and the social interest in the security of acquisitions are but feebly protected and may even be defeated. The individual interest of personality is defeated if the limits of the rights that secure it are not set off by fixed rule and maintained by a uniform course of judicial action. Under an oriental régime one must take many chances in believing that his ideas of justice will agree with those for the time being of the judge or magistrate when he passes upon the matter; one cannot with safety do anything involving large expenditure of labor or money or extending over a long time. With increasing complexity of affairs, the bad effects of such lack of rule in the administration of justice are more acute.[26] Civilization increases this complexity, and so demands law, that is, rule and order in the administration of justice, so that men may act assuredly with reference to the future. One essential of the administration of justice in a modern state, then, is uniformity. Experience has shown abundantly that this is attainable only by measuring situations and relations, as they become the subjects of controversy, by reason. To a certain extent, the will of society as to the relations of individuals with each other may be ascertained and declared in advance. But, as a rule, this is possible only along general lines. Hence, for the great mass of causes, uniformity and certainty are to be reached in no other way than by requiring the magistrate to bring a trained reason to bear upon them. The idea with which we meet sometimes, that courts should administer the will of the people for the time being in each case, is as un-legal and opposed to justice as the corresponding seventeenth-century notion that in every case they ought to administer the will of the king for the time being.[27]

[25]Continental writers who urge wider discretion for judges are recognizing that strong judges must be part of the reform. See, for example, Grabowsky, Recht und Staat, 25.

[26]For an example of failure of justice without law in modern times see Thayer, Legal Essays, 91 ("A People Without Law"), 135-139.

[27]Thus, Sir C. Hatton said it was "the holy conscience of *the Queen*, for matter of equity that is in some sort committed to the Chancellor." Spence, History of the Equitable Jurisdiction of the Court of Chancery, I, 414; Bacon, on taking his place as Lord Keeper announced in his speech

If left to act freely in individual cases, without rule or standard, no will, either of king or of people, is sufficiently set and constant to insure a uniform administration of justice.[28] Judicial or magisterial caprice is incompatible with the paramount social interest in general security.

A modern community not only requires law, but it requires a great deal of law. In a crowded world, compromises between the activities of each and the activities of his fellows are necessary at many points. Increase in the possibilities of human action as well as increase in the number of those who may act demands increased limitations upon each individual in the interest of free action by other individuals; and yet such limitations in reality increase the possibilities of effective individual action by making division of labor possible. Division of labor cannot exist without restraints on the liberty of each in the interest of the like liberties of all. But these limitations, to achieve their purpose, must be regulated definitely, and, as we have seen, that means for practical purposes that they must be regulated by reason. In other words, they require law. They require that certainty in definition and application involved in the administration of justice according to law. Accordingly, the whole course of development of society has shown a movement away from justice without law and toward the working out of a scientific and complete body of rules for the administration of justice.[29]

And yet there are other interests to be taken account of—not the least of them, the social interest in the individual moral and

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that the King's charge was his lantern to guide the conduct of his office, Works. (Spedding's ed.) XIII, 182, 184; Sir Robert Heath, in Darnel's trial, laid it down *arguendo* that the duty of the judges was to take the law from the King on all matters of royal action and reminded them of the then royal power of recall of judges, saying: "there be *Arcana Dei et Arcana Imperii* and they that * * * make themselves busier with them than their places do require, they will make themselves—I will say no more." 3 How. State Trials, 44; Compare: "The supreme court, so far as it is a purely judicial body,—that is a body for hearing and deciding cases—is simply a means of executing the will of the state." Smith, Spirit of American Government, 345. "Judges should be independent of every power on earth except the sovereignty that creates them. Meet that proposition of democracy." Manahan, Proc. Minn. Bar Ass'n, 1911, 128.

[28]"Kings generally appointed judges to carry out their will which was just defeating the end for which the office ought to exist. Judges are in no sense representatives of the people or the king, or of any will whatever, except so far as they take a place which the people or the king filled before." Woolsey, Political Science, II, 330.

[29]Saleilles, speaking of the reaction from the movement in France which threatened to replace law by sociology, says: "More and more the idea of law, the idea of juridical order and of juridical security is gaining ground." L'individualisation de la peine (2nd ed.) ii.

social life. We have to administer justice to a community of free-willing men, and to deal with relations of conduct and aspects of conduct which require fine shades and particular compromises as well as the broad lines and general compromises which are required by and suffice for those social and individual interests which are involved in the purely economic existence. In an agricultural society, where the economic existence is simple, justice without law is at its best. In a commercial and industrial society, where the economic existence is extremely complex, and delimitation of individual interests is demanded by the social interest in security of transactions and security of acquisitions, justice without law is pushed to the wall by the demand for a maximum of certainty. Yet the need of and the place for discretion in the administration of justice in such a society is no less real, as the failure of the attempt to reduce all things to rule in the nineteenth century has made manifest. The problem is not to discover the fundamental principles or ultimate conceptions from which a complete and perfect body of rules may be deduced, but to define rightly the respective provinces of these two elements in the administration of justice and to give to each its proper development in that province.

II. Justice According to Law.[30]

Administration of justice according to law means administration according to standards, more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receiving like treatment. It means an impersonal, equal, certain administration of justice, so far as these may be secured by principles of decision of general application.

It has commonly been thought that the ideal is a perfect system of rules by which, either expressly or indirectly through rigid deduction or a sort of mathematically exact development of the logical content of what is expressed, all causes may be determined with an absolute certainty of like result in like cases and an absolute assurance that accurate prediction of the result may be made, if the facts are rightly understood.[31] Experience has shown

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[30]Pollock, First Book of Jurisprudence, Pt. I, chap. 2; Salmond, First Principles of Jurisprudence, 90-92; Salmond, Jurisprudence, §§ 9-10; Demogue, Les notions fondamientales du droit privée, Pt. I, chaps. 2-3.

[31]Leibniz, Ratio corporis iuris reconcinnandi, Dutens, Leibnitii opera omnia, IV, 3. 235; "one certain law, then, must be established, which, by laying down solid principles, may be applied to all the cases that occur

that this ideal cannot be realized. Even in the most matured legal systems causes arise constantly for which the rule must be made or ascertained after the event. It is only within somewhat wide limits, often, that a jurisprudence of conceptions,—that is a system of logical deduction from fixed legal premises,—may be made to insure certainty of predicting the result upon given facts.[32] We have been wont to say that this is a necessary evil, arising from the infinite variety of human actions and the constant changes to which all things are subject; and in great measure so it is. Even if a jurisprudence of conceptions proved equal to covering all conceivable cases, it would be intolerable, if adhered to with absolute logical consistency, because the premises, made for the ends of one time, would prove inadequate to the ends of another time. Hence a chief objection to such a plan for attaining absolute certainty lies in its application to the conditions of periods of transition. By and large, the whole course of legal development has been toward greater certainty, greater precision in the delimitation of interests and definition of legal standards of decision, and a more complete and detailed working out of those standards. When, in certain periods of legal development, some reversion to justice without law has been necessary, as a means of liberalizing an over-rigid body of rules, an evolution of new rules has always followed hard upon its heels. Thus in Anglo-American law the origin of equity may be referred to the same power of dispensing with the law in particular cases for particular reasons that afterward helped to bring about the downfall of the Stuarts. Equity began as a reaction toward justice without law.[33] It became a system of rules wherein the element of judicial discretion was given greater play and the circumstances of particular cases were more attended to than the practice of the common law would permit. But as soon as it began to be a system, the scope for discretion began to narrow steadily. Hence the development from the roguish equity of which Selden spoke, which he said varied with the chan-

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* * * that is to say, a body of law reduced to a system, containing the whole of jurisprudence, ranged in the most natural and convenient order, with the general principles on every subject and the consequences flowing from them." Preface to the project of Frederick the Great's Code, §§ 1-2; Hegel, Grundlinien der Philosophie des Rechts, § 216; Austin, Jurisprudence, Lect. 39. See also Geny, Méthode d'interprétation, § 10; Cruet, La vie du droit, 61.

[32]There is a suggestive discussion of this point in Phelps, Juridical Equity, §§ 183-184.

[33]Salmond, First Principles of Jurisprudence, 93.

cellor's foot,[34] to Lord Eldon's equity, which was made up of doctrines "as well settled and uniform *almost* as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case."[35] The next step, namely, to *apply* the principles as fixedly "almost" as those of the common law are applied, was taken by American state courts at the end of the nineteenth century.[36]

It was remarked long ago that law and equity, meaning thereby in part, if not chiefly, justice according to law and justice without law, are in continual progression:

"Law and equity are in continual progression; and the former is constantly gaining ground upon the latter. Every new and extraordinary interposition is, by length of time, converted into an old rule. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next."[37]

To the same effect, Amos says:

"The alternative appearances of law and of equity as the mutual checks and corrections of one another are lasting and not transitory phenomena. However severely and peremptorily equity, and all the arbitrary judicial power implied in its exercise at par-

[34]"Equity in law is the same that the spirit is in religion, what everyone pleases to make it, sometimes they go according to conscience, sometimes according to law, sometimes according to the will of the court. Equity is a roguish thing; for the law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard. For it the measure we call a chancellor's foot, what an uncertain measure this would be. One chancellor has a long foot, another a short foot, another an indifferent foot; 'tis the same thing in the chancellor's conscience." Selden, Table Talk, tit. Equity (Selden died 1654). In 1648, Whitelocke, Lord Commissioner under the Commonwealth, said: "The proceedings in Chancery are *secundum arbitrium boni viri*, and this *arbitrium* differeth as much in several men as their countenances differ. That which is right in one man's eyes is wrong in another's." Commons Journals, VI, 373. "And namelie for as moch as conscience is a thinge of great uncertaintie; for some men thinke that if they treade upon two strawes that lye acrosse that they ofende in conscience, and some man thinketh that if he lake money, and another hath too moch, that he may take part of his with conscience; and so divers men, divers conscience." Replication of a Serjaunte at the Lawes of England to Certain Pointes Alledged by a Student of the said Lawes of England (*temp.* Henry VIII), Hargrave, Law Tracts, 323, 325.

[35]Gee v. Pritchard (1818) 2 Swanst. 402, 414. Compare Lord Blackburn in Brooks v. Blackburn Benefit Society (1884) L. R. 9 A. C. 857, 866: "This is an important decision. It seems to be justice; whether it is technical equity is a question which, I think, is not now before this House."

[36]See many examples and a discussion of the reasons therefor in my paper, The Decadence of Equity, 5 COLUMBIA LAW REVIEW, 20.

[37]Millar, Historical View of the English Government, II, 358.

ticular epochs, may be controlled and discredited, there is reason to think its resurrection must be constantly waited for. So soon as a system of law becomes reduced to completeness of outward form, it has a natural tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand. The invariable reaction against this stage is manifested in a progressive extension, modification, or complete suspension of the strict legal rule into which the once merely equitable principle has been gradually contracted."[38]

In this view, justice without law is limited to a perennially recurring task of liberalization, as from time to time the inevitable effects of system are felt in over-rigid rules. But the very fact that in the pursuit of certainty and equality rules become over-rigid suggests that there is more to be done than merely to rejuvenate the law at recurring intervals. Undoubtedly this must be done, and justice without law has been one of the agencies by which it has been done in the past. In large part, however, justice without law reconquers from time to time a legitimate field from which law cannot wholly exclude it.[39] It is, therefore, a mistaken ideal that conceives of an ultimate reduction of everything to rule. Since Savigny's critique of the eighteenth-century projects for codification, jurists have given up the notion of attaining such an ideal through legislation, and in the nineteenth century they sought to attain it by an ideal development of traditional principles from which a certain rule for every cause might be deduced by purely logical processes. More recently a reaction from the resulting jurisprudence of conceptions has been in progress the world over.[40] In part this reaction calls for a freer exercise of judicial reason

[38]Science of Law (2nd ed.) 57-58. See also the observations of Lord Hardwicke, Letter to Lord Kames on the Principles of Equity, Parkes, History of the Court of Chancery, 501, 505-6. But this prophecy of continual recurrence to justice without law as a means of liberalization is not justified entirely by the past, and is by no means verified by the present. The law merchant was a liberalizing element, and yet it involved no return to justice without law. The socialization of law appears to be going forward at present with, at least, a minimum of justice without law. There may be liberalization by absorption of a non-professional element into the law, and yet that element may be taken over and administered in the form of rules.

[39]Procedure is a typical example. The liberal procedure of the Year Books grew into a hard and fast system of pleading; the judicial common sense of the eighteenth century and of the first part of the nineteenth century grew into a hard and fast law of evidence. We are now going back to discretion in procedure after sore experience of the impossibility of reducing it wholly to fixed rules.

[40]Saleilles speaks of this reaction as a time "when jurists were confronted on the one hand by unprofitable essays in the field of abstract law and on the other hand by dangers threatened by reformers who, in their disregard of the judicial attitude, were prepared to replace law by sociology." L'individualisation de la peine, preface to 2nd ed. (English transl. pp. xxi-xxii).

than in the past. But it calls also for a setting free of more than one part of judicial administration from the fetters of detailed rules.[41] In the preceding section some reasons were given for thinking that it will be futile to seek for some third method of attaining the ideal of a complete and perfect system of rules, and for holding that administration of justice without law is an essential element of all administration of justice. It is now in order to approach this question and the problem of the respective provinces of rule and discretion from another side.

Administration of justice according to law has six advantages:[42] (1) Law makes it possible to predict the course which the administration of justice will take; (2) law secures against errors of individual judgment; (3) law secures against improper motives on the part of those who administer justice; (4) law provides the magistrate with standards in which the ethical ideas of the community are formulated; (5) law gives the magistrate the benefit of all the experience of his predecessors; (6) law prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty, immediate interests.

It is unnecessary to say that the first of these advantages is decisive in the modern world. The social interests in security of acquisitions and security of transactions demand not only a peaceable ordering of society but quite as much certainty and uniformity of magisterial and judicial action. Where law brings about this certainty and uniformity, labor and capital may be spent upon great undertakings of a permanent character with assurance of the course which the state will pursue and will compel others to pursue with respect thereto. Hence in the history of law, as Montesquieu pointed out, periods of commercial and industrial development make for certainty.[43] The industrial and commercial world de-

[41]Upon both phases of this reaction, see my paper, Mechanical Jurisprudence, 8 COLUMBIA LAW REVIEW, 605. Perhaps nowhere is this movement away from rules and reversion to wide judicial powers so marked as in the Juvenile Courts and Courts of Domestic Relations which are coming to be so much in vogue.

[42]Salmond, First Principles of Jurisprudence, 90-92; Salmond, Jurisprudence, § 9; Korkunov, General Theory of Law (Hastings' transl.) 326-327, 395-396.

[43]L'esprit des lois, liv. XX, chap. 18. *Cf.* Carter, Law: Its Origin, Growth, and Function, 335-336. Hence the insistence upon certainty as a paramount requirement in nineteenth-century law. "Uncertainty is the gravest defect to which a law can be exposed and must *at whatever cost* be avoided." Hearn, Theory of Legal Duties and Rights, 43. "Their justice or injustice in the abstract is of less importance to the community than that the rules themselves shall be constant and invariable." Lord Westbury in Ralston *v.* Hamilton (1862) 4 Macq. 397, 405. See also Lord Cottenham in Lozon *v.* Price (1840) 4 My. & Cr. 600, 617; Parke, B., in Mirehouse *v.* Rennell (1833) 1 Cl. & F. 527, 546.

mand rules. No one devotes his life to a specialized bit of labor, becoming a minute cog in an industrial machine, or engages in complex commercial undertakings, or makes large investments trusting to uniform exercise of discretion or to free judicial search for the right.[44]

The second and third advantages are no less decisive in modern society. Political experience has made clear abundantly the truth of Stammler's axiom of justice through law: "One will must not be subject to the arbitrary will of another."[45] The individual interest in personality and the social interest in the individual moral and social existence require precise delimitation of interests of personality and judgment of conduct by standards applied in accordance with principles of reason.[46] If rules and over-rigid standards sometimes hinder the judge and prevent the best solution of which he is capable, they secure us against the well-meant ignorance of the weak judge and are our mainstay against improper motives on the part of those who administer justice. Oriental judges, bound by little or no law, are notoriously corrupt.[47] A judge tied down on every side by rules of law and the necessity of publicly setting forth his reasons upon the basis of such rules, cannot do much for a corrupter, if he would. In consequence, highly formal

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[44]"It may be that his decision will be governed by 'the social standard of justice,' but the essential point is that no human being can tell how the social standard of justice will work on that judge's mind before the judgment is rendered." Fox, Law and Logic, 14 Harv. Law Rev. 39, 43.

[45]Lehre von dem richtigen Rechte, 208.

[46]"Of course in the application of legal rules conflicts must occur which must be determined by the reason of the judge. * * * But the worst solution would be to give full play to the well-meant personal opinions of the judge in order to do away with these conflicts." Hegel, Grundlinien der Philosophie des Rechts, § 211 (Dyde's transl. p. 208). An important function of law, in this connection, is to insure an even balance between conflicting class interests. "While the sovereign claims of the common welfare are today admitted in form, the modern multitude, like the aristocracy it has displaced, is apt to assume that its own interest is necessarily identical with the common welfare. It threatens at times to pass under the domination of those who in place of the old notion that the welfare of the majority should be subordinated to the interests of the minority, would substitute the doctrine that the interests of the minority need not be taken into account." Jethro Brown, Underlying Principles of Modern Legislation, 197. This is the justification of American constitutional law.

[47]Compare the administration of justice without law by lay magistrates in Colonial America: "As the executive functionaries were not generally lawyers, * * * they were not much influenced in their decisions by any known principles of established law. So much, indeed, was the law supposed to depend upon the favor or aversion of the court, that presents from suitors to the judges were not uncommon, nor, perhaps, unacceptable." Plumer, Life of William Plumer, chap. 5, p. 149.

and technical systems are often prized as bulwarks of liberty,[48] and necessary liberalizations which involve judicial discretion are looked upon with suspicion by those who would be expected to stand for progress.[49]

Although less important, the fourth and fifth advantages are very real. Even where detailed rules are impossible from the nature of the case, if we are to prevent arbitrary subjection of the will of one to the will of another, something more than a general reference to the social standard of justice or the ethical notions of the community is required. The law may furnish standards where it cannot furnish rules, and these standards may formulate the social standard of justice or the ethical notions of the community so as to guide the magistrate. More than this, the rules and principles of the law contain the experience of the past in administering justice. No judge can hope to have the experience which they involve and make available. In this respect the law has been compared aptly to the rules and formulas of the engineer. The engineer finds the wisdom and experience of his predecessors summed up in these formulas. He has only to apply them. He may never be able to discover all of them independently for himself. He may never have seen some of them exemplified. He may

[48] "The Commons petitioned against Chancery ten times between the reigns of Richard II and Henry VI. See Coke, Fourth Institute, 82-84; in 1653 the House of Commons voted "that the High Court of Chancery of England shall be forthwith taken away, and that a bill be brought in for that purpose." Parkes, History of the Court of Chancery, 149; the American colonies obstinately resisted equity. Loyd, Early Courts of Pennsylvania, chap. 4; Woodruff, Chancery in Massachusetts, 5 Law Quart. Rev. 370; Wilson, Courts of Chancery in the American Colonies, Select Essays in Anglo-American Legal History, II, 779, 792-795. The ground of hostility to equity in each of these cases was substantially that stated by the sixteenth-century serjeant at law: "Also me seemeth that this suit by a subpœna is againste the common well of the realme. For the commen well of everie realme is to have a good lawe, so that the subjects of the realme maie be justified by the same, and the more plaine and open that the lawe is, and the more knowledge and understanding that the subject hath of the lawe, the better it is for the common well of the realme; and the more uncertaine that the lawe is in any realme, the lesse and the worse it is for the common well of the realme. But if the subjects of any realme shall be compelled to leave the lawe of the realme, and to be ordered by the discretion of one man, what thinge may be more unknowen or more uncertaine?" Hargrave, Law Tracts, 323, 325. Compare: "Yea, it is a considerable *Quaere*, Whether the Court of Chancery were not first erected merely to elude the letter of the Law, which, though defective, yet had some certainty; and, under a pretence of conscience, to devolve all causes upon mere Will." Warre, The Corruption and Deficiencies of the Lawes of England (1649).

[49] "Thus, Jefferson advocated a rule against citation of English decisions after the accession of George III, on the ground that it would get "us rid of all Mansfield's innovations." Tyler, Letters and Times of the Tylers, I, 265.

never have worked out a single formula. Yet by means of these formulas he can work swiftly and surely. In the same way the judge can dispatch a large part of the great mass of litigation that comes before him in the modern court with assured confidence by applying formulas which he has no time to work out anew, which, moreover, he need not know how to reach independently.[50]

Finally, administration of justice according to law insures that in the weighing or balancing of conflicting interests, the more valuable ultimate interests, social and individual, will not be sacrificed to immediate interests which are more obvious and pressing but of less real weight. It provides a standard, determined in advance of controversy upon deliberate and dispassionate review of all the interests to be secured and the relative importance of each in the long run, and thus opposes an effective check to the natural human impulse to yield future interest to apparent present advantage. In this way the law secures social interests, such as the interest in security of social institutions and the interest in the use and conservation of natural media which, if controversies were adjusted by the unfettered will of the magistrate in each case, might be made to yield continually to the more immediately urgent interests of individuals.[51]

On the other hand administration of justice according to law has certain inherent disadvantages. (1) Certainty and uniformity are sought through rules or through logical deductions from fixed principles and narrowly defined legal conceptions. But rules must be made for cases in gross and for men in the mass.[52] From the fact that they are rules, they must operate, if not blindly, at least impersonally and mechanically.[53] (2) Moreover the science and system involved in a jurisprudence of conceptions carry with them a tendency to make law an end rather than a means, a tendency

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[50]Salmond, Jurisprudence, § 9; Dillon, Laws and Jurisprudence of England and America, 231.

[51]Thomas Aquinas, Summa Theologiae, Prima Secundae, q. 95, art. 2, § 2 (Rickaby's transl.).

[52]See Maine, Early History of Institutions, 393; Jethro Brown, Underlying Principles of Modern Legislation, 181.

[53]Compare, for instance, a rule of property law with a "maxim" of equity. "Unlike maxims, they [i. e. rules] are narrow and definite in their scope . . practical and pointed in their application." Phelps, Juridical Equity, § 178. The same author says in another place: "Maxims are useful as standards of weight and measure by which the bearing and effect of circumstances in proof can be tested and estimated. Having performed this office, maxims then stand for the point of view from which a court will finally adjust its position to contemplate and adjudge the case." *Id.* § 185. The latter represent a movement toward certainty in a jurisdiction that at first administered justice without law.

to make what is a practical matter over-academic and over-scientific. Such a tendency was very marked in legal systems at the end of the nineteenth century. (3) Again, law begets more law and a developed system has always produced a tendency to attempt rules where rules are impracticable and to invade the legitimate domain of justice without law.[54] (4) Finally, as law formulates settled ethical ideas which cannot in periods of transition accord with the more advanced conceptions of the present, there is always an element, greater or less, that does not wholly correspond to present needs or to present conceptions of justice.

Connected with the problem of rule and discretion, of justice according to law and justice without law, is the problem by whom justice is to be administered. Is there to be a specialized organ of the state for the performance of the judicial function, or is that function to be performed in whole or in part by organs charged with other functions as well? Is there to be administration of justice by specialists (judicial justice) or by those who wield other governmental powers as well (legislative justice, executive justice) or partly by one and partly by the other, and, in the latter case, where shall we draw the line between them? Answer must be made to these questions in the next paper.

III. Legislative Justice.[55]

Until recently, the theory of separation of powers was fundamental in our juristic thinking as well as in our political thinking. It was taken to be an axiom of free government. The proposition that separation of powers is essential to liberty was accepted as stated by Montesquieu:

> "There is no liberty if the power of judging is not separated from the legislative power and from the executive power. If it were joined to the legislative power, the power over the life and the liberty of the citizens would be arbitrary; for the judge would be legislator. If it were joined to the executive power, the judge might have the force of an oppressor."[56]

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[54] See my paper, Mechanical Jurisprudence, 8 Columbia Law Review, 605.

[55] Sidgwick, Elements of Politics. 355-356, 360. 482-484; Burgess. Political Science and Constitutional Law. II, 356-361; Benton, The Distinction between Legislative and Judicial Functions, Rep. Am. Bar Assn. VIII, 261.

[56] Esprit des lois, liv. xi. chap. 6. "Liberty can have nothing to fear from the judiciary alone. but would have everything to fear from the union with either of the other departments." Federalist, No. 78.

Hitherto, moreover, the development of our legal system had conformed steadily to this theory. In the sixteenth and seventeenth centuries it was settled that the crown had no part in the administration of justice, that causes which concern the life or inheritance or goods or fortune of the subject were not to be decided by the natural reason of the executive "but by the artificial reason and judgment of the law" as pronounced by the king's justices.[57] Legislative justice lingered in legislative divorces, acts of attainder and of pains and penalties, and private acts of parliament or of legislatures creating special rules for particular cases or individuals or affording special relief. Legislative divorces were known in New York after the Revolution,[58] and in Pennsylvania,[59] Ohio,[60] Maryland,[61] Connecticut[62] and Rhode Island[63] in the nineteenth century. Pennsylvania did not abolish them till 1874, and so late as 1887 the dissolution of a particular marriage was held a rightful subject of legislation by a territory of the United States.[64] Acts of attainder and bills of pains and penalties were not uncommon in America during and after the Revolution.[65] The legislature of Rhode Island exercised jurisdiction in insolvency until 1832.[66] During the Revolution and even later the practice obtained in some states of awarding a new trial by legislative act after final judgment.[67] Finally appellate jurisdiction was exercised by the legislature in Rhode Island till 1857[68] and by the

[57]Case of Prohibitions del Roy (1608) 12 Rep. 63.

[58]Kent, Commentaries, II, 97.

[59]Cronise *v.* Cronise (1867) 54 Pa. St. 255, 260. In 1873, the last year in which such jurisdiction was exercised, eighteen private divorce acts were passed. See Loyd, Early Courts of Pennsylvania, 102.

[60]Bingham *v.* Miller (1848) 17 Ohio, 445.

[61]Crane *v.* Meginnis (1829) 1 Gill & J. 463, 474.

[62]Starr *v.* Pease (1831) 8 Conn. 541.

[63]The Rhode Island legislature entertained applications for divorce till 1852. Eaton, Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153.

[64]Maynard *v.* Hill (1888) 125 U. S. 190. The legislature of Alabama granted a divorce in the session of 1888-1889. But the act was held unconstitutional. Jones *v.* Jones (1891) 95 Ala. 443.

[65]Thompson *v.* Carr (1831) 5 N. H. 510; Cooper *v.* Telfair (1800) 4 Dall. 14; Sleight *v.* Kane (N. Y. 1801) 2 Johns. 236; Jackson *v.* Sands (N. Y. 1801) 2 Johns. 267; Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Illinois Law Rev. 81, 147.

[66]Eaton, Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 150-153.

[67]Plumer, Life of William Plumer, 170; Warren, History of the American Bar, 136. In Merrill *v.* Sherburne (1818) 1 N. H. 199, 216, four cases of this legislative granting of new trials between 1791 and 1817 are referred to.

[68]See Mr. Eaton's paper, note 63, *supra.*

senate in New York till 1846.[69] But the nineteenth century saw the end of almost all such legislation. Legislative divorces came to an end in England in 1856 and are now precluded by constitutional provisions in the several United States.[70] The Federal Constitution put an end to acts of attainder and bills of pains and penalties, and English writers of the eighteenth century regarded them as vicious in principle and substantially obsolete.[71] The abortive bill of pains and penalties brought against Queen Caroline is probably the last of its kind. In consequence of constitutional provisions, the courts put an end to legislative granting of new trials early in the last century.[72] As has been seen, legislative appellate jurisdiction ended in this country in 1857. Adjustment of claims against the state by legislative assemblies still disgraces the public law of many commonwealths.[73] In England, however, by virtue of statutes, claims against the crown, after a formal petition of right and *fiat,* take the ordinary course of judicial proceedings.[74] And the federal government as well as an increasing number of the states, by providing courts of claims, have put justice between state and citizen on a footing of law rather than of politics.

This obsolescence of legislative justice apparently completed the legal structure founded by fourteenth-century judges, built up so laboriously by Coke, and fixed in American institutions by the Federal Constitution and the Fourteenth Amendment. We had achieved in very truth a *Rechtsstaat.* Our government was one of laws and not of men. Administration had become "only a very subordinate agency in the whole process of government."[75] Complete elimination of the personal equation in all matters affecting the life, liberty, property or fortune of the citizen seemed to have been attained. Nothing is so characteristic of American public law of the nineteenth century as the completeness with which executive action is tied down by legal liability and judicial review.

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[69]An account of the abolition of this jurisdiction and the reasons therefor may be found in Browne, The New York Court of Appeals, 2 Green Bag, 277, 278.

[70]Bondy, The Separation of Governmental Powers (Columbia University Studies in History, Economics and Public Law, vol. 5, no. 2) chap. 12.

[71]Wooddesson, Lectures, II, 382 *et seq.*

[72]Merrill *v.* Sherburne (1818) 1 N. H. 209.

[73]Fleischmann, The Dishonesty of Sovereignties, Rep. N. Y. State Bar Ass'n XXXIII, 229.

[74]Anson, Law and Custom of the Constitution (2nd ed.) II, 475.

[75]Amos, Science of Law, 397.

The tendency was strong to commit matters of clearly executive character to the courts, and no small number of statutes had to be rejected for such violations of the constitutional separation of governmental powers.[76] But the paralysis of administration produced by our American exaggeration of the common-law doctrine of supremacy of law brought about a reaction. And that reaction, as the last remnants of legislative justice were disappearing, brought back the long obsolete executive justice and has been making it an ordinary feature of our government.[77]

Somewhat later the paralysis of social legislation which appeared to be threatened in many jurisdictions by unhappy exercisings of the judicial power over unconstitutional legislation, has brought about a demand for something very like legislative justice in the form of direct popular action upon judicial questions or popular review of judicial decisions.[78] Hence, whereas twenty-five years ago it might have seemed pedantic to consider legislative justice and executive justice in any discussion of justice according to law, unless in the course of a historical sketch of the rise and progress of judicial justice, today the whole question of the agencies by which justice shall be administered is reopening and calls for solution along new lines. For the political theory of the immediate past rested upon philosophical principles which are failing us on every hand. Nor can we accept the lines which have been drawn as the result of historical development in the past as necessarily conclusive of the course which we shall take for the future. To answer this question today we must ask how far legislative justice, executive justice and judicial justice respectively further the ends of the administration of justice.

In the eighteenth century the separation of powers was regarded as an absolute and fundamental principle of law and politics. Montesquieu has been quoted. In the same spirit the French Declaration of the Rights of Man and of the Citizen asserts:

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[76]It is noteworthy that the first cases in which acts of Congress were held unconstitutional by the Supreme Court of the United States were of this character. *In re* Hayburn (1792) 2 Dall. 409; U. S. *v.* Todd (1794) 13 How. 52, note.

[77]See *post,* IV, Executive Justice.

[78]See Smith, Spirit of American Government, 111-113; McCarthy, The Wisconsin Idea, 268-269. For recent discussions of this subject, see Roe, Our Judicial Oligarchy (1912); Ransom, Majority Rule and the Judiciary (1912).

"Every community in which a separation of powers and a security of rights is not provided for, lacks a constitution."[79]

From eighteenth-century political and juristic thinking the idea passed into American constitutional law and the framers of our constitutions, state and federal, sought to make it the basis of our government. Thus, the Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts (1780) provides:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."[80]

But the attempt to make an exact analytical scheme of the powers of government according to this threefold division has failed.[81] As actually drawn in America, the line is historical only in many places.[82] Students of political science have discarded the theory of separation of powers as an absolute, fundamental doctrine,[83] and courts are finding themselves driven by experience of the impossibility of the thing to recognize that fine analytical lines cannot be drawn.[84] For sovereignty is a unit. The so-called three powers are not three distinct things; they are three general types of manifestation of one power. In the development of sovereignty, these three types have differentiated gradually as a

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[79]Declaration of the Rights of Man and of the Citizen, art. 16 (1789). Translations may be found in Paine, Rights of Man, and in Ritchie, Natural Rights. See also Blackstone, Commentaries, I, 142, 266; Rousseau, Contrat social, liv. iii, chaps. I, II.

[80]Mass. Const. Pt. I, § 30. See Bondy, The Separation of Governmental Powers (Columbia University Studies in History, Economics and Public Law, vol. 5, no. 2) chap. 2.

[81]Goodnow, Principles of Administrative Law in the United States, 25-26; Willoughby, Constitutional Law of the United States, II, §§ 742, 743. *Cf.* Schouler, Ideals of the Republic, 206.

[82]Murray *v.* Hoboken Land & Improvement Co. (1855) 18 How. 272; Maynard *v.* Hill (1888) 125 U. S. 190; State *v.* Harmon (1877) 31 Oh. St. 250; Callanan *v.* Judd (1868) 23 Wis. 343, 349; Parkman *v.* Rice (1820) 16 Mass. 326, 329. See Bondy, The Separation of Governmental Powers, 69-85; Salmond, Jurisprudence, § 35.

[83]Goodnow, Comparative Administrative Law, I, chap. 3; Sidgwick, Elements of Politics, 363; Baldwin, Two Centuries' Growth of American Law, 37; Fuzier-Herman, La séparation des pouvoirs, 181 *et seq.*; Haurion, Principes de droit public, 446; Jellinek, Recht des modernen Staates (2nd ed.) I, 483-487, 585-601; Schmidt, Allgemeine Rechtslehre, I, 209-217; Treitschke, Politik (2nd ed.) II, 131 *et seq.* See also Powell, Separation of Powers, Pol. Science Quart. XXVII, 215.

[84]Brown *v.* Turner (1874) 70 N. C. 93, 102; George *v.* People (1897) 167 Ill. 447, 459; People *v.* Joyce (1910) 246 Ill. 124; France *v.* State (1897) 57 Oh. St. 1, 17; State *v.* Webster (1898) 150 Ind. 607, 621; Crawford

result of experience that certain things which demand special competency or special training or special attention are done better by those who devote thereto their whole time or their whole attention for the time being. The principle involved, therefore, is no more than the principle involved in all specialization:

"The decisive reason," says Bluntschli, "for such specialization [*i. e.*, the separation of powers] is not the practical security of civil liberty, but the organic reason that every function will be better fulfilled if its organ is specially directed to this particular end than if quite different functions are assigned to the same organ."[85]

In legal and political history this specialization of function has proceeded very slowly. The first differentiation was a setting apart of the deliberative or legislative from the administrative or executive. Although the genius of Aristotle foresaw the further specialization that was to take place,[86] it had by no means taken place in his day, and the Roman polity to the end regularly confided judicial powers to administrative officers.[87] Many eighteenth-century writers carry their theory no further than separation of the legislative from the executive.[88] After differentiation of legislative from administrative functions has gone a long way, the judi-

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v. Hathaway (1903) 67 Neb. 325, 367; Farm Investment Co. *v.* Carpenter (1900) 9 Wyo. 110, 144. *Cf.* Prentis *v.* Atlantic Coast Line (1908) 211 U. S. 210; People *v.* Willcox (1909) 194 N. Y. 383. There are courts, however, that still insist upon rigid analytical lines. *E. g.*, People *v.* Dickerson (1910) 164 Mich. 148, 153; City *v.* Schoeberlein (1907) 230 Ill. 496. American lawyers still state Montesquieu's doctrine in its extreme form. Schouler, Ideals of the Republic, chap. 9; Wyman, Administrative Law, § 17; Green, The Three Departments of Government, Proc. Kan. Bar Ass'n (1910) 27. "Nearly a half-century before our Federal Constitution emerged, Montesquieu formulated and defended upon *unanswerable philosophical and historical considerations* the dogma that neither public nor private liberty could be maintained without a division of the legislative, executive and judicial functions of government." Mr. Justice Lurton, A Government of Law or a Government of Men? No. Am. Rev. CXCIII, 9, 13-14 (Jan. 1911). (The italics are mine.)

[85] Allgemeine Staatslehre, bk. iii, chap. 7.

[86] Politics, VI. 14.

[87] Mommsen, Abriss des römischen Staatsrechts (2nd ed.) 236-238, 357-358.

[88] De Lolme, Constitution of England, Intr. Chaps. 3, 4; Rousseau, Contrat social, liv. iii, chap. 1. Locke, a century before, had recognized three powers, legislative, executive and federative (*i. e.*, treaty-making or diplomatic). But he conceived that the executive and the federative power should reside in the same person. Two Treatises on Government, bk. ii, chaps. 8, 12. It is obvious that historical reasons have determined the three-fold division in the American polity and the great insistence upon the judicial department. It is instructive to notice that the Canadian constitution has nominally a two-fold division only, while the Australian constitution here as elsewhere follows the American model. Clark, Australian Constitutional Law, 28 *et seq.*

cial function may remain undifferentiated and may be exercised by both the legislative and the executive organs of the state. The ordinary judicial functions of the English king passed to his justices at a relatively early date and the residuum passed later to the court of chancery; so that by the seventeenth century all royal judicial power was obsolete.[89] But parliament retained judicial functions much longer. The most we can say is that judicial justice has grown out of and gradually been set apart from legislative and executive justice, and in the long run has tended to replace them. But the exact lines are matters of practical convenience and expediency. Moreover this development has gone along with the development of justice according to law. It may well be asked, therefore, how far are these the same development seen from the respective sides of means and end? If they are so identical, it may be asked, on the one hand, does not justice according to law require a purely judicial administration in the modern state, and, on the other hand, has a judiciary any special or peculiar qualification for that part of the administration of justice which must proceed without law? To answer these questions we must have recourse to legal history as well as to politics and political philosopy.

Examples of legislative justice may be found in the Greek trials before popular assemblies, in the Roman capital trials before the people and appeals to the people in criminal causes,[90] in the Germanic administration of justice by the assemblies of freemen, in the judicial power of the English parliament, in the power of the French senate to "pass judgment upon the President of the Republic and the ministers and to take cognizance of attacks upon the security of the state,"[91] in the judicial power of the German Bundesrath,[92] in the exercise of judicial power by American colonial legislatures[93] and to some extent by state legislatures after the

[89]Prohibitions del Roy (1608) 12 Rep. 63.

[90]Mommsen, Römisches Strafrecht, 151-174; Strachan-Davidson, Problems of the Roman Criminal Law, chaps. 8, 9.

[91]Loi constitutionelle du 24 février, 1875, art. 9.

[92]Constitution of the German Empire, art. 77. This is exercised in practice by delegation to a court or to legal experts. Laband, Staatsrecht des deutschen Reiches (5th ed.) I, § 29, III.

[93]Bigelow, Judicial Action by the Provincial Legislature of Massachusetts Bay, 2 Columbia Law Rev. 536; Miller, The Legislature of the Province of Virginia (Columbia University Studies in History. Economics and Public Law, vol. 28) 168; Fry. New Hampshire as a Royal Province (Columbia University Studies in History, Economics and Public Law, vol. 29) 440.

Revolution, in legislative impeachments, and in the disposition of claims against the state in most of our commonwealths today. Some of these instances are of no great value for our purposes, because they are taken from primitive societies in which all justice was crude. But for the most part they are modern, or relatively modern, and enable us to determine with assurance the characteristics of legislative justice. Examining the actual operation of legislative justice in the several cases named, it may be said without hesitation that in action it exhibits all the bad features of justice without law.

In the first place, legislative justice is unequal, uncertain, and capricious. Bills of attainder, even in modern times, were too often merely legislative lynchings,[94] and bills of pains and penalties, of which there were many examples during and immediately after the Revolution, were enacted capriciously, were procured on grounds of ill will in relatively trivial cases as well as in the grave cases involving danger to the commonwealth for which they were supposed to be reserved, and became deservedly odious.[95] In Rhode Island, we are told, legislative divorces were sought and granted in cases that were "too flimsy or too whimsical for judicial treatment."[96]

Again, legislative justice in its relatively short history in this country and in the relatively small number of cases in which it was exercised showed the influence of personal solicitation, lobbying and even corruption far beyond anything which even the most bitter opponent of our judicial system has charged against the

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[94]Belknap, History of New Hampshire, chap. 26; Thompson *v.* Carr (1831) 5 N. H. 510; Jay, Works, I, 315; Moore, History of North Caroline, I. 255.

[95]Woodddesson, Lectures, II, Lect. 41; Tucker, Blackstone, I, 292-294; Adams, Works, X, 193; Hamilton, Works, I, 297; Federalist, no. 44; Miller, The Constitution, 584; Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Illinois Law Rev. 81, 147. Professor Thompson says of the New Hampshire Act of 1778: "It proscribed seventy-six citizens and confiscated the property of twenty-six of them. * * * The act was blindly designed and in a violently partisan spirit. No liberty was given those banished to collect debts honestly due them: no distinction was made between those who withdrew from the state out of a sense of duty, and those who were, in fact, British subjects." (3 Illinois Law Rev. 151-2). Jay said of the New York Act of 1779, which forfeited the estates of fifty-nine persons and made them liable to the penalty of death, if found in the state, "New York is disgraced by injustice too palpable to admit even of palliation." Works, I, 315.

[96]Eaton, The Development of the Judicial System in Rhode Island, 14 Yale Law Journ. 148, 153.

courts in the course of a long history and after disposition of a huge volume of litigation.[97]

Thirdly, legislative justice has always proved highly susceptible to the influence of passion and prejudice. This was very marked in the Greek popular courts and was, indeed, so much a matter of course, that rhetoricians taught the principles of appeals to the passion and prejudice of the tribunal and considered the cases where such appeals were expedient.[98] This feature of legislative justice was one of the chief causes of the odium which attached to acts of attainder and bills of pains and penalties at the end of the eighteenth century.[99] It is equally marked in legislative impeachments.[100]

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[97] *Ibid.* See also Plumer, Life of William Plumer, 176; Parker, C. J., in Pierce v. State (1843) 13 N. H. 536, 537; Debates of Pennsylvania Constitutional Convention (1873) III. 5-20. In Pennsylvania, down to the constitutional changes in 1874, the legislature could enact private laws upon a great variety of subjects, including divorce. In the debates in the Constitutional Convention of 1873 we read: "We all know that it is one of the most approved ways of bribing a member of the legislature to retain him as counsel for a particular interest upon which he is asked to legislate" (III, 7); "instead of going and making proper representations to the legislature * * * they would go and say to a member of the legislature: 'Here, I will give you so much money, you take this bill in charge, and put it through, and give me no more trouble about it.'" (*Id.* 11). As was said justly in the debate, nothing of the sort was ever heard of in purely judicial tribunals. (*Id.* 14). In the eighteenth century, trading votes on appeals (what we should call log-rolling) was a frequent practice among the lay peers. Encyclopedia Britannica (11th ed.) II, 214.

[98] Aristotle, Rhet. II, 2-8.

[99] Speaking of the North Carolina act of 1779, Professor Thompson says: "Among those who suffered was Sir Henry Dunkinfield, an enlightened Loyalist, whose crime simply amounted to a difference of political opinion." 3 Illinois Law Rev. 162. Of the proceedings in Pennsylvania after the British evacuation of Philadelphia, he says: "The passion and prejudice of the populace failed, at times, to distinguish between mere political sentiment and the giving of aid and comfort to the enemy." *Id.* 157. Tucker, writing in 1803, when the memory of such acts was fresh, said that an act of attainder was "a legislative declaration of the guilt of the party, without trial, without a hearing, and often without the examination of witnesses." Tucker's Blackstone, I. 293. See also Flick, Loyalism in New York during the American Revolution (Columbia University Studies in History, Economics and Public Law, vol. 14) chap. 7.

[100] Thus, in the impeachment of Judge Addison (Pennsylvania, 1803) both houses denied him a copy of the articles and compelled him to copy them for himself (Trial of Addison, 9); it was only by repeated application and after much opposition that he was allowed process for witnesses (*Id.* 7-15). The committee of the house of representatives, which considered the charges, reported that they "do not apprehend that the offences with which the said Alexander Addison stands charged in the said impeachment are sufficient ground to authorize and require the prosecution thereof by this house." The house summarily rejected this report and proceeded. *Id.* 13. The ground of the impeachment was at best that an erroneous view had been enforced as to the powers of the lay associates of the presiding judge, and the proceeding has been de-

Closely related to the foregoing characteristic of legislative justice is a fourth, namely, the preponderance of purely partisan or political motives as grounds of decision. This is a conspicuous feature of legislative determination and adjustment of claims against the state.[101] It is conspicuous also in legislative impeachments.[102] It was notorious in the appellate jurisdiction of the

scribed by a judicial reviewer as "the most flagitious ever urged on by * * * obnoxious partisanship." Address of Judge Agnew before the Allegheny Bar Ass'n., Pennsylvania Magazine, XVI, 1. Loyd says of this impeachment, "the conduct of the legislature has met with general reprobation." Early Courts of Pennsylvania, 143. Of the impeachment of Chief Justice Shippen and Justices Yeates and Smith (Pennsylvania, 1805) the same author says: "That any doubt could be felt as to the issue of this trial is a matter of wonder, and that thirteen out of twenty-four senators voted for conviction is a lasting disgrace to their names." *Id.* 146. In the impeachment of Governor Butler (Nebraska, 1871) there was a conviction upon the first article which charged the governor with appropriating to his own use upwards of $16,000 of public money. The judgment pronounced was simply removal from office. As the one dissenting senator said, *arguendo*, "if the governor is a suitable person to hold office hereafter, I do not see why we should remove him at the present time." (Trial of David Butler, 55). In 1877 the legislature adopted the following resolution: "That the records of the impeachment and removal from office of David Butler, late governor, be and the same are hereby expunged from the journals of the senate and house of representatives of the eighth session of the legislature of Nebraska." Neb. Laws of 1877, 257. It is significant that when a new constitution was adopted in that state, a few years after this impeachment, it was provided that impeachments should be tried before the Supreme Court. Const. Neb. (1875) art. 3, § 14.

[101]Mark Twain has given us a characteristic sketch of the manner in which Congress dealt with claims against the government prior to the Court of Claims. The Facts ... the Case of George Fisher, Deceased. Works (Mission ed.) XIX, 132.

[102]The classical example is the impeachment of Andrew Johnson. See particularly the curious and inconsistent rulings of the senate upon admissibility of evidence, in the course of which the opinions of the Chief Justice of the Supreme Court were overruled. Trial of Andrew Johnson (official ed.) I, 674, 693, 696-697, 698-700, 701; also the opinions, particularly those of Senator Yates, *Ibid.* III, 102, 115, Senator Morrill of Maine, *Ibid.* 145-146, Senator Wilson, *Ibid.* 217-218, Senator Sumner, *Ibid.* 247-248, 256-260, 274-281. Some instructive comments upon the political character of these rulings and upon the opinions of the senators may be found in Blaine, Twenty Years in Congress, II, 360-370, 381. *Cf.* also Littlefield, The Impeachment of Judge Swayne, 17 Green Bag, 193. In the Constitution of New York adopted in 1846, the judges of the Court of Appeals were joined with the senators as members of the court for the trial of impeachments. The reason for this, as stated in the debates in the convention, was that the members of the senate "like those of all legislative bodies were more or less imbued with partisan feelings" and experience had shown "that an impeachment in an excited state of political feeling might grow out of that very feeling;" hence the "propriety of infusing into the court a share of the judicial force to restrain that feeling." Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York, 1846, 557. As to the last English impeachments, see the comments of Sir James Stephen, History of the Criminal Law, I, 160, and of Mr. Lovat Fraser, The Impeachment of Lord Melville, 24 Juridical Rev. 235. The former says: "The impeachment of Warren Hastings is, I think, a blot on the judicial history of the country."

House of Lords, until the settled practice that only law lords should vote turned the judicial side of that body into an ordinary court of justice.[103] It furnished one of the chief reasons for the abolition of the appellate jurisdiction of the senate in New York in 1846.[104]

Finally legislative justice has been disfigured very generally by the practice of participation in argument and decision by many who had not heard all the evidence and participation in the decision by many who had not heard all the arguments. This was notorious when lay peers passed upon causes in the House of Lords,[105] and is often conspicuous in analogous cases of impeachments and legislative investigations.[106] Such a practice is wholly unknown in judicial justice, nor would the public tolerate it in judicial tribunals.

Are there any advantages in the administration of justice by legislative bodies to be set over against the foregoing defects? The one advantage claimed for it is that it is more responsive to the popular will. Similarly, in recent agitation for direct popular justice in certain cases, the advantage is claimed that justice will be made more immediately and completely expressive of the popular

[103]Encyclopaedia Britannica (11th ed.) II, 214. This was conspicuous in the attempt of lay lords to vote upon the reversal of the outlawry in Queen *v.* O'Connell. See Atlay, Victorian Chancellors, I, 144-145; Campbell, Lives of the Lord Chancellors, VIII, 144-146. It should be noted that the firmness of Lord Lyndhurst, a judge whose view of the law the lay peers sought to sustain, prevented a grave scandal to the administration of justice. Politically, he was in agreement with those whom he dissuaded from voting.

[104]"The Court for the Correction of Errors was distrusted as a fluctuating and partisan body, too numerous and unwieldy, containing many who had no knowledge of law and yet were not apt to yield to the opinions of the lawyers." Browne, The New York Court of Appeals, 2 Green Bag, 277, 278.

[105]See note 102, *supra*. In the debates upon the judiciary in the New York Constitutional Convention of 1846, as a reason for a court of appeals composed of judges only, it was said that the court must be composed of "men who heard all the arguments and were present during the whole trial: they would not read, write, whisper or walk about when the trial was going on." Debates and Proceedings, 755.

[106]In the impeachment of Edmonds (Michigan, 1872) no less than twenty-one senators who voted upon the charges were absent during considerable portions of the time when testimony was taking. In the impeachment of Cox (Minnesota, 1881) thirty-three senators who voted upon all of the charges were absent from four to thirty-six days of a total of fifty-five. Two were absent ten days, one eleven days, one twelve days, two fourteen days, two fifteen days, two sixteen days, one seventeen days, two twenty days, two twenty-one days, one twenty-two days, one twenty-four days, one twenty-six days, one twenty-seven days, one twenty-nine days, one thirty-four days, and one thirty-six days. In the impeachment of Judge Prescott, a very suggestive colloquy took place between Daniel Webster, of counsel for the respondent, and the President of the Senate with reference to the disposition of the tribunal to arrive at a decision without having heard argument. Trial of Prescott, 207-209.

will.[107] The confusion of will and impulse involved in this claim has been remarked repeatedly.[108] But another consideration is of more weight. It must be borne in mind that the psychology of such tribunals is to a great extent the psychology of a crowd or mob. In a court, long habit, training, tradition and the critical scrutiny of a learned profession keep down the tendency to throw off individual responsibility, to abdicate individual reason and to yield to suggestion and impulse. In a large body not so trained and without judicial habits, we should expect, and experience shows that we must expect, many of the characteristic phenomena of what psychologists call the mob mind.[109] Moreover, administration of justice by large bodies of this sort, along with or in the intervals of political business, is necessarily cumbersome and expensive.[110] In sum, legislative justice is uncertain, crude at its best and capricious at its worst, cumbersome and expensive, with no corresponding advantages. Hence from the Twelve Tables[111] to modern constitutions[112] men have agreed in prohibiting it. The provisions of modern constitutions in this respect represent more than the influence of eighteenth-century theory. They represent a universal experience of the ills involved in legislative justice.

IV. Executive Justice.[113]

In the nineteenth century the United States developed a system of judicial interference with administration. Law paralyzing administration was an everyday spectacle. Almost every important

[107] See note 78, *supra*.

[108] This matter is well treated in Sidgwick, Elements of Politics, 360.

[109] "The big assembly skirts ever the slippery incline that leads down to mob madness." Ross, Social Psychology, 57. See Le Bon, The Crowd, chap. 5; Sidis, Psychology of Suggestion, 299.

[110] This was especially true of the legislative appellate jurisdiction in New York before 1846. Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York, 1846, 568.

[111] Tab. IX, l. 1 (Bruns, Fontes Iuris Romani Antiqui (6th ed.) I, 34).

[112] Clark, Australian Constitutional Law, 28 *et seq.*; Const. Brazil, arts. 15, 79 (Dodd, Modern Constitutions, I, 153, 176); Chili, art. 99 (Dodd, I, 253); Denmark, art. 2 (Dodd, I, 267); Mexico, art. 50 (Dodd, II, 44).

[113] Pound, Executive Justice, 55 Am. Law Reg. 137; Sidgwick, Elements of Politics, chap. 19, § 6; Bluntschli, Theory of the State (3rd Oxford ed.) 521-524; Friedman, A Word about Commissions, 25 Harvard Law Rev. 704; Goodnow, The Growth of Executive Discretion, Proc. Am. Pol. Sci. Ass'n., II, 29; Parker, State and Official Liability, 19 Harvard Law Rev. 335; Harriman, Administrative Control of Corporations, Proc. Am. Pol. Sci. Ass'n., VI, 33; Parker, Administrative Courts for the United States, and discussion by Ernst Freund and F. J. Goodnow, *Id.* 46, 58, 62; Powell, Judicial Review of Administrative Action in Immigration Proceedings, 22 Harvard Law Rev. 360; Ambrose, The New Judiciary, 26 Law Quart. Rev. 203.

measure of police or administration encountered an injunction. We relied on taxpayers' suits to prevent waste of public funds and misuse of the proceeds of taxation. In some jurisdictions it was not uncommon to see collection of taxes restrained by injunction. In case of disturbance of the peace, the individual, and even in one signal instance the nation, had come to appeal for the protection of property and business, not to the police or to the administrative authorities, but to courts of equity. In a number of states the courts would direct writs of mandamus to the governor, where ministerial action was involved,[114] and in one state, in a heated election contest, the Supreme Court by mandamus ordered the speaker of the house of representatives to carry out constitutional provisions as to canvass of returns.[115] What in other lands was committed to administration and inspection and supervision in advance of action we left to the courts, preferring to show the individual his duty by a general law, to leave him free to act according to his judgment, and to prosecute him and impose the predetermined penalty in case his free action infringed the law. It was deemed fundamental in our polity to confine administration to the inevitable minimum. In other words, where some peoples went to one extreme and were bureau-ridden, we went to the opposite extreme and were law-ridden.

A reaction from the extreme limitations of administration in our traditional polity, accelerated by the demands of an expanding law of public utilities and the requirements of modern social legislation, resulted in a rapid development of administrative bodies of all kinds and an incidental recurrence to executive justice. Contemporary legislation shows clearly enough that this recrudescence of executive justice is gaining strength continually and is yet far from its end. There is a strong tendency to take away judicial review of administrative action wherever it is constitutionally possible to do so, and where it is not possible, to cut down such review to the unavoidable minimum. This is manifest especially in recent legislation for the regulation of public utilities. An avowed object of most of the recent acts upon this subject is "to do away with the great delays, enormous expense, and great uncertainty of litigation,"[116] and this end is sought to be attained by setting up ad-

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[114]The cases are collected in a note in 10 Michigan Law Rev. 480.

[115]State *v.* Elder (1891) 31 Neb. 169.

[116]Downey, Regulation of Urban Utilities in Iowa, 81. Prior to the recent public utility acts, an observer wrote: "The gradual growth of the doctrine of judicial review and the gradual development of the methods employed by the courts, have gradually paralyzed the state rail-

ministrative tribunals and making their decisions final so far as possible. Where review is allowed, it is coming to be narrowly limited. Provisions that the legal rules of evidence shall not apply to these tribunals and that their proceedings shall not be examined for infringement of such rules are becoming common.[117] In California[118] and Vermont[119] the findings of fact made by public utility commissions are pronounced conclusive. In five states, the courts, in reviewing the administrative proceedings, are restricted to the case certified to them by the commission.[120] But the reaction has gone much beyond restriction of judicial power in the regulation of public service companies. From fifteen to twenty statutes giving wide powers of dealing with the liberty or property of citizens to administrative boards, to be exercised summarily or upon such hearing as comports with lay notions of fair play, may be found enumerated in the reviews of current legislation in each of the last fifteen reports of the American Bar Association.[121] In the western states, within a decade, the venue of litigation over private water rights has been shifted from the courts to state boards of engineers or administrative boards of control. In Wisconsin, the State Industrial Commission is made an "administrative court of appeal."[122] Workmen's compensation legislation is threatening to

road commissions by destroying their will as well as their power. Under the burden of judicial review, the commissions have become discouraged from the task of rate regulation: most of them pay relatively slight attention to the matter of rates, confining themselves largely to the other and much less important duties imposed upon them. Some have practically desisted from rate-making. Some esteem their duty done when they attempt to arbitrate the few cases between carrier and shipper which are brought to their attention, but which form only a microscopical part of the great question of rates. This relaxation of effort, this growing indifference to the most important of all their functions, has been conspicuous in recent years, and is a discouraging feature of the railroad problem of today." Smalley, Railroad Rate Control, 124.

[117]In the model Public Utility Law, proposed by the department on Regulation of Utilities of the National Civic Federation, the provision on this point reads: "In the conduct of all hearings and investigations the commission shall not be bound by the technical rules of evidence. No informality of any proceeding or in the manner of taking testimony before the commission or any commissioner or any agent of the commission shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission."

[118]California Public Utilities Act, 1912, § 67.

[119]Vermont, Laws of 1908, no. 116, § 12.

[120]California Public Utilities Act, 1912, § 67; New Jersey, Public Utilities Act, 1911, § 38; Oklahoma, Const. art. IX, § 22; Vermont, Laws of 1908, no. 116, § 12; Washington Public Service Commission Act, 1911, § 86.

[121]The report for 1904 enumerates nineteen. The report for 1905 shows at least eighteen. In 1907 there are at least twenty-three.

[122]Wisconsin, Laws of 1911, chap. 485, § 1021, b-18, ¶ 2-3. See Commons, The Wisconsin Industrial Commission, The Survey, Jan. 4, 1913, p. 440.

take a great mass of tort litigation out of the domain of law and confide it to administration. Even in criminal causes, which we think of as *par excellence* the domain of the common law, juvenile courts, probation commissions and other attempts to individualize the treatment of offenders, and the endeavors of the medical profession to take questions of expert opinion out of the forum and commit them to a sort of medical referee,[123] bid fair to introduce an administrative element into punitive justice which is wholly alien to our inherited ideas.

Nor is the legislature alone in bringing back this extra-legal element to our public law. A brief review of the course of decision for the past fifty years will show that the judiciary has fallen into line and that powers which fifty years ago would have been held purely judicial and jealously guarded from executive exercise are now decided to be administrative only and are cheerfully conceded to boards and commissions.

As yet judicial acquiescence in the revival of executive justice is a tendency only. The courts are not agreed. Some courts hesitate, while some are willing to give up everything but formal actions at law and suits in equity.[124] The tendency, however, is well marked. In general, the cases prior to 1880 tend to hold all matters involving a hearing and determination, whereby the liberty, property or fortune of the citizen may be affected, to be judicial. Since 1880, the cases, at first requiring an appeal or a possibility of judicial review, but later beginning to cast off even that remnant of judicial control, tend more and more to hold every sort of power that does not involve directly an adjudication of a controversy between citizen and citizen,—and in the case of disputes over water-rights and election contests some which do—to be administrative in character and a legitimate matter for executive boards and commissions.

Irrigation statutes afford an excellent example. Disputes over water-rights, where the conflicting claims of numerous appropriators, who had often "appropriated" many times over the maximum flow of the stream, threatened to give rise to multiplicity of suits, were first taken in hand by equity. The suit to "adjudicate a stream" became a familiar proceeding.[125] Later the matter was

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[123]See Oppenheimer, The Criminal Responsibility of Lunatics, chap. 17. *Cf.* Jelliffe, The New York State Bar Association Questionnaire—Some Comments, Journ. Am. Inst. Crim. Law and Criminol. IV, 368.

[124]State *v.* Thorne (1901) 112 Wis. 81.

[125]Woodruff *v.* North Bloomfield Gravel Mining Co. (1883) 8 Sawy. 628; Frey *v.* Lowden (1886) 70 Cal. 550; Crawford *v.* Hathaway (1903) 67 Neb. 325, 370.

taken in hand by legislatures, and statutes were enacted whereby the power to determine the nature, priority and effect of the several appropriations and to apportion the stream was given to a state engineer or a state board of irrigation or a state board of control.[126] In 1870, a statute of this character was held unconstitutional on the ground that the power conferred was judicial.[127] Today, the courts are agreed that the power is not judicial and such statutes are upheld.[128] Again the older decisions were reluctant to concede to executive boards any power of hearing and determining charges against public officers and of removing them after such hearing.[129] At least one comparatively recent authority shows the same tendency.[130] But the later cases have settled that this power of removal after investigation may be given to executive officers or boards.[131] Power to determine who had the right to vote,[132] or to try election contests,[133] was formerly held to be judicial. Today it is settled that executive officers, without any appeal to the courts, may determine conclusively who are and who are not citizens.[134] Election contests may now be determined by administrative boards.[135] It has been decided that a Secretary of State may hear and determine a county-seat election contest,[136] that executive officers may be empowered to pass conclusively upon disputes as to

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[126]"The legislature, finding the ordinary processes of law and the actions then known to the courts too expensive and also inadequate to meet the novel conditions incident to the appropriation of water for the purposes of irrigation, enacted a statute which * * * furnishes an elaborate system of procedure for the settlement of all questions of priority of appropriation of water." Long, Irrigation, § 99.

[127]Thorp *v.* Woolman (1870) 1 Mont. 168.

[128]Farm I. Co. *v.* Carpenter (1900) 9 Wyo. 110; Crawford *v.* Hathaway (1903) 67 Neb. 325; Boise I. & L. Co. *v.* Stewart (1904) 10 Ida. 38. "They are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes." Farmers' High Line Canal & Reservoir Co. *v.* Southworth (1889) 13 Colo. 111.

[129]State *v.* Towne (1869) 21 La Ann. 490; Police Com'rs *v.* Pritchard (1873) 36 N. J. L. 101.

[130]Arkle *v.* Board of Com'rs (1895) 41 W. Va. 471.

[131]Donahue *v.* Will County (1881) 100 Ill. 94; State *v.* Oleson (1883) 15 Neb. 247; State *v.* Hawkins (1886) 44 Oh. St. 98; Fuller *v.* Ellis (1893) 98 Mich. 96; Cameron *v.* Parker (1894) 2 Okla. 277; Gilbert *v.* Board of Police Com'rs (1895) 11 Utah 378; State *v.* Common Council (1895) 90 Wis. 612; Gibbs *v.* Louisville (1896) 99 Ky. 490.

[132]Burkett *v.* McCarty (Ky. 1874) 10 Bush, 758.

[133]Stone *v.* Elkins (1864) 24 Cal. 125.

[134]U. S. *v.* Ju Toy (1905) 198 U. S. 253; U. S. *v.* Sing Tuck (1904) 194 U. S. 161, Sing *v.* U. S. (1895) 158 U. S. 538.

[135]Andrews *v.* Judge of Probate (1889) 74 Mich. 278.

[136]Bowen *v.* Clifton (1898) 105 Ga. 459.

nominations for public office,[137] and that a canvassing board may be empowered to determine the cause of withholding of returns not received and if they think it due to an intent to defeat the will of the electors, proceed to canvass those received.[138] As late as 1883, a statute giving a board of county commissioners power to hear and determine complaints against holders of licenses and to revoke licenses accordingly, was held bad as giving judicial power to executive functionaries.[139] Such power is now regarded as administrative only.[140] Recent decisions establish that power conferred upon a state board of land commissioners to cancel leases of state lands for fraud in procuring them is not judicial,[141] that the decision of an executive officer refusing to issue a patent to state lands is not judicial,[142] and that examiners who pass on one's right to practise a profession for which he has trained himself do not act judicially.[143] How far the exercise of wide powers of determining title to land under land-registration statutes is judicial, courts are not agreed.[144] How far the power to transfer inmates of a reformatory to a penitentiary, for mistake as to age, incorrigibility, or like cause, is judicial, has been a matter of dispute,[145] but very wide administrative powers with respect to parole and probation are coming to be upheld.[146] Nor are the courts insisting, as formerly, upon provision for judicial review. Statutes permitting the imposition of a penalty by an executive officer without any judicial trial and making the decision of a commissioner of navigation final on all questions of collection of tonnage tax and of refunding tonnage tax erroneously or illegally collected have been upheld.[147] An administrative officer may

[137]Allen *v.* Burrow (1904) 69 Kan. 812.

[138]Feek *v.* Township Board (1890) 82 Mich. 393.

[139]State *v.* Brown (1883) 19 Fla. 563.

[140]Hartford F. I. Co. *v.* Raymond (1888) 70 Mich. 485.

[141]American Sulphur & Min. Co. *v.* Brennan (1905) 20 Colo. App. 439.

[142]State *v.* Timme (1884) 60 Wis. 344.

[143]*Ex parte* Whitley (1904) 144 Cal. 167; *In re* Inman (1902) 8 Ida. 398; State *v.* Hathaway (1892) 115 Mo. 36.

[144]Tyler *v.* Judges of Registration (1900) 175 Mass. 71; People *v.* Simon (1898) 176 Ill. 165; State *v.* Guilbert (1897) 56 Oh. St. 575.

[145]Such a power was held judicial and statutes conferring it upon executive functionaries were held bad in People *v.* Mallary (1902) 195 Ill. 582; *In re* Dumford (1898) 7 Kan. App. 89. *Contra, In re* Linden (1902) 112 Wis. 523.

[146]People *v.* Joyce (1910) 246 Ill. 124; Berry *v.* Comm. (1911) 141 Ky. 422; State *v.* Ferguson (1910) 149 Ia. 476; Wallace *v.* State (1912) 91 Neb. 158; Ughbanks *v.* Armstrong (1908) 208 U. S. 481.

[147]Oceanic Steam Navigation Co. *v.* Stranahan (1909) 214 U. S. 320; North German Lloyd S. S. Co. *v.* Hedden (1890) 43 Fed. 17.

be authorized to determine finally and conclusively not only whether an alien has or has not sufficient property to enter the United States,[148] but even whether a person, who claims to be a citizen and as such to have the right to enter the United States, is or is not a citizen.[149] The review of assessments and equalization may be left finally to a purely administrative board.[150] A statute may confer wide and summary powers of dealing with property on a board of health without providing for any appeal.[151]

It is instructive to set over against the foregoing decisions the claim made by Coke for the Court of King's Bench:

"This court hath not only jurisdiction to correct errors in judiciall proceedings, but other errors and misdemeanors extra-judiciall tending to the breach of the peace or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either publick or private, can be done, but that this shall be reformed or punished in one court or other by due course of law."[152]

The new point of view is well expressed in these words:

"The administration of justice, properly so called, involves two parties, the party plaintiff and the party defendant, a wrong complained of by the former as done by the latter, and a remedy by way of redress or punishment applied to such wrong. Judicial proceedings which do not possess these characteristics, however closely in point of form they may approach to those which do, are essentially different from the administration of justice."[153]

To what are we to attribute this radical change of front? How are we to explain the tendency, judicial as well as legislative, to rely upon boards and commissions, to forego judicial control over arbitrary executive action, and to give free rein to summary administrative powers? Partly, the increasing complexity of life and minute division of labor require it. Yet this complexity and this division of labor developed for generations in which the common-law jealousy of administration was dominant. To no small extent, we must see in this recrudescence of executive justice one of those reversions to justice without law which are perennial in legal history and serve, whenever a legal system fails for the time being to fulfil its purpose, to infuse into it enough of current morality to preserve its life.

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[148]Lem Moon Sing *v.* United States (1895) 158 U. S. 538.
[149]United States *v.* Ju Toy (1905) 198 U. S. 253.
[150]State *v.* Thorne (1901) 112 Wis. 81.
[151]Brown *v.* Narragansett (1899) 21 R. I. 503.
[152]4 Inst. 71.
[153]Salmond, First Principles of Jurisprudence, 75.

An instructive parallel may be found in the history of our legal system. In the middle of the sixteenth century, lawyers began to complain that the common law was being set aside and that scarcely any business of importance came to the king's courts of law. In the reign of Queen Mary, an observer wrote that the common-law judges had little to do but to look about them.[154] At this time, Maitland tells us, "in criminal causes that were of any political importance an examination by two or three doctors of the civil law threatened to become a normal part of our procedure."[155] For three hundred years the growing point of law had been in the king's courts of common law. As far back as the reign of Edward III, they had enforced the doctrine of the supremacy of law upon the collectors of the king's taxes[156] and had made clear to the king that he could not interfere by private letter with the due course of justice,[157] and more recently they had laid down that even parliament could not make the king a parson.[158] In Tudor England this growth stopped for a season. For a time the growing point of law was in quite another type of tribunal than the courts of common law. That was the age of the King's Council, of the Star Chamber, of the Court of Requests, of courts of a Roman, and, what was more important, a summary procedure. The movement away from the common law was a movement from judicial justice administered in courts to executive justice administered in administrative tribunals or by administrative officers. In other words, it was a reaction from justice according to law to justice without law, and in this respect again the present movement away from the common-law courts is parallel.

Equity, both at Rome and in England, began as executive justice. The *praetor*, interposing by virtue of his *imperium*,[159] the emperor enforcing *fidei-commissa* because, as the Institutes say, he was "moved several times by favor of particular persons,"[160] the Frankish king deciding, not according to law, but *secundum aequitatem* for those whom he had taken under his special protection.[161] and the Chancellor granting relief "of almes and chari-

[154]Maitland, English Law and the Renaissance, 82, n. 52.

[155]*Id.* 22.

[156]Y. B. Mich. 12 E. 3, no. 23 (1338).

[157]Reginald de Nerford's Case, Y. B. Hil. 14 E. 3, no. 54 (1339-40).

[158]Prior of Castleacre's Case, Y. B. 21 H. 7, 1 (1506).

[159]Cicero, In Verrem, I, 45, 46.

[160]Inst. II, 23, 1.

[161]Goodwin, The Equity of the King's Court before the Reign of Edward I, 12.

tie,"[162] acted without rule in accordance with general notions of fair play and sympathy for a wronged or weaker party. The executive justice of today is essentially of the same nature. It is an attempt to adjust the relations of individuals with each other and with the state summarily, largely according to the notions of an executive officer for the time being as to what the general interest and a square deal demand, unencumbered by many rules. The fact that it is largely justice without law is what commends it now to a busy and strenuous age, as it was what commended it to the individualism of an England set to thinking freely and vigorously by Renaissance and Reformation. Moreover, the causes of each movement away from the common law courts and hence from the law are much the same. In each of the partial reversions to justice without law referred to, it happened that for the time being the law was not fulfilling its end. It was not adjusting the relations of individuals with each other so as to accord with the moral sense of the community. Hence *praetor* or emperor or king or chancellor administered justice for a season without law till a new and more liberal system of rules developed. In part a similar situation may be remarked today. The world over a shifting of ideas as to the end of the law and the meaning of justice is putting a heavy pressure upon the administration of justice according to law. This is inevitable, and only the gradual working out and fixing of the new conception can relieve the pressure. But another cause admits of more immediate relief. The machinery of justice may be more important for practical purposes than the rules to which that machinery gives effect. Often when the layman objects to the law it is because he judges the legal principle, not abstractly, as the lawyer does, but by what he takes to be its concrete workings; and these are often not the necessary workings of the rule itself, but only the chance working of a machinery inadequate to its task of making the rule effective. For example, Professor Wyman has made it clear that the principles of the common law were entirely adequate to deal with the problems of regulating public utilities. What failed was the enforcing agency.[163] Our prolific modern legislation has contributed nothing on the substantive side. Whatever it has accomplished of permanent value is in the way of providing better machinery.

Accordingly we may compare profitably the courts developed in and for feudal England, struggling to meet the wants of England

[162]Dodd v. Browning, Calendars of Proceedings in Chancery, I, 13.

[163]Public Service Companies, I, § 42.

of the Reformation by a feudal property law, with American courts, developed in and for the pioneer or agricultural communities of the first half of the nineteenth century, struggling to meet the wants of today with the rules and the machinery devised for such communities. Today the pressure of industrial accidents, a problem unknown to the formative period of our present law, the pressure of social legislation, which requires more speedy and assured enforcement than the legislation of the past, the new demands upon administration made by crowded urban communities, the great increase of litigation involved in the expansion of commerce and industry, as well as by the rapid growth of population, and the new demands upon law, involved in a period of secularization in which we call upon law to do what was done formerly by church and home—all these strain to the utmost not merely the substantive law, but, even more, the machinery of application and enforcement.

We may, then, attribute the present popularity of executive justice partly to defects in our legal system, to an inadequacy of our legal tradition to the demands of a new idea of justice. But there is here little that is peculiar to American law. The problem of adjusting the law, shaped by the individualism of the past three centuries, to the ideal of social justice of the twentieth century is world-wide. Elsewhere this cause operates alone. In the United States it is aggravated by others. For the recrudescence of executive justice must be attributed chiefly to two other causes: (1) to a bad adjustment between law and administration, and (2) to the archaic organization of our courts, to cumbrous, ineffective and unbusinesslike procedure, and to the waste of time and money in the mere etiquette of justice, which, for historical reasons, disfigure American practice.[164] Recognizing this, we may take hope from legal history. For, although Coke lost in his quarrel with the Court of Chancery, the other Romanized courts perished, and Chancery was made over gradually along common-law lines. The equity made in the Court of Chancery and the law as to misdemeanors made in the Star Chamber became parts of our legal sys-

[164]In England prior to the Judicature Acts like causes were producing a like condition. Spencer, Essays, Moral, Political and Aesthetic (Am. ed.) 97-99. The revival of executive justice in England was undoubtedly retarded by the improved machinery of judicial administration introduced by the Judicature Act. But new social and economic conditions are bringing about "a tendency in recent years to remove from the courts matters which properly belong to them, and entrust them to Government Departments." Speech of the Master of the Rolls at the Mansion House, 1911, 56 Solicitors Jl. 77.

tem; it is not too much to say they became parts of the common law. The common law survived and the sole permanent result of the reversion to justice without law was a liberalizing and modernizing of the law.

Thus the experience of the past indicates that if we improve the output of judicial justice till the adjustment of human relations by our courts is brought into better accord with the moral sense of the public at large and is achieved without unreasonable, not to say prohibitive delay and expense, the onward march of executive justice will soon cease. But we must be vigilant. Legislatures are pouring out an ever-increasing volume of laws. The old judicial machinery has been found inadequate to enforce them. They touch the most vital interests of the community, and it demands enforcement. Hence the executive is turned to. Summary administrative action becomes the fashion. An elective judiciary, sensitive to the public will, yields up its prerogatives, and the return to a government of men is achieved. If we are to be spared a season of oriental justice, if we are to preserve the common-law doctrine of supremacy of law, the profession and the courts must take up vigorously and fearlessly the problem of today—how to *administer* the law to meet the demands of the world that is. "Covenants without the sword," says Hobbes, "are but words."[165] If the courts cannot wield the sword of justice effectively, some other agency must take it up.

But there is more to do than to improve the machinery of judicial administration of justice. A better adjustment between law and administration is needed. For historical reasons, administration has been the weak point of our common-law polity. England had a strong central government at an earlier date than the rest of the modern world. England had also strong courts of general jurisdiction before her neighbors. Hence before there was much call for administration of a modern type, need had been felt of putting checks upon the English crown in the interest of the individual and of the local community; and strong courts were at hand to impose them. The tendency thus acquired by our law was intensified during the seventeenth-century contests between courts and crown and was still further intensified by the conditions of the formative period of American law. A pioneer or a sparsely settled rural community is content with and prefers the necessary minimum of government. The social interests in general security, in

[165]English Works (Molesworth's ed.) III, 154.

security of acquisitions and in security of transactions require a certain amount of governmental machinery. They require civil and criminal tribunals and standards of decision to be applied therein. But when every farm was for the most part sufficient unto itself, the chief concern was lest the governmental agencies set up to secure these social interests might interfere unduly with individual interests. This pioneer jealousy of governmental action was reinforced from another quarter. Puritan influence had much to do with shaping originally the materials upon which we worked in making American law and American legal institutions. It had more to do with the way in which we worked them into an American common law.[166] The age of Coke, the classical period of our Anglo-American common law, was the age of the Puritan in England. Indeed the parliament of the Commonwealth printed Coke's Second Institute, some parts of which are almost a text book of our American bills of rights. And the period that ends with the Civil War, the formative period of American law, was the age of the Puritan in America.

The Puritan conceived of law as a guide to the individual conscience. The fundamental proposition from which he proceeded was that man was a free moral agent with power to choose what he would do and a responsibility co-incident with that power. Hence he put individual conscience and individual judgment in the first place. He believed that no authority should coerce them, but that everyone must assume and abide the consequences of the choice he was free to make. His principle of consociation rather than subordination[167] demanded that a fixed, absolute, universal rule, which the individual had contracted to abide, be resorted to; not the will nor discretion of the magistrate. It demanded that the state and the law interfere after action, but not before; it demanded judicial imposition of penalties upon one who had wilfully chosen the wrong course, not administrative compulsion to take the right course. Hence our polity developed an inconsistency that is part of the Puritan character. He rebelled against control of his will by state or magistrate, yet he loved to lay down rules, since he believed in the intrinsic sinfulness of human nature. In the same way we have devoted our whole energies to legislation and judicial law-making. At the same time the enforcing agencies, both ad-

[166] See my paper, Puritanism and the Common Law, 45 Am. Law Rev. 811.

[167] "We are not over one another," said Robinson, "but one with another." See Lord Acton, Lectures on Modern History, 200.

ministrative and judicial, have not merely been neglected, they have been deliberately tampered, lest they interfere unduly with the individual free will.

We have tried, then, to extend law to matters not suitable for judicial justice, and thus have tied down administration too rigidly. But we have tried also to reduce the judicial administration of justice to chapter and verse of written rule on its purely administrative side, for example in the law of evidence and the details of procedure, where a wide margin of discretion is imperative. Accordingly, our judicial justice has not merely broken down in the attempt to do what was not judicial, but it has fallen far short of what it should be in purely judicial matters.

Granting that administration should be left to administrative officers, what are the advantages of executive justice in the determination of ordinary controversies and the application and enforcement of the rules of private law? Those which are claimed for it are those which are claimed for justice without law; directness, expedition, conformity to the popular will for the time being, freedom from the bonds of purely traditional rules, freedom from technical rules of evidence and power to act upon the everyday instincts of ordinary men. Obviously, therefore, its defects are those of justice without law, and need not be repeated. A few points, however, deserve especial emphasis Directness and freedom from forms and from traditional rules have disadvantages as well as advantages. Forms serve a useful purpose in the administration of justice so far as they compel deliberation and by so doing guard against suggestion and impulse and "mob-mind" and insure the application of reason to the cause in hand.[169] Again, where laws are administered by laymen without conscious attempt to work out a system of reasoned interpretation and application, the results are quite as unsatisfactory, though in another way, as when they are administered with pedantic narrowness by lawyers. Thus in the administration of workmen's insurance in Germany, a serious defect has developed in the tendency of the administrative Insurance Court to "regard itself rather as a body charged with the admin-

[169] "Those who would conduct such proceedings as they would a committee meeting or a business conference quite overlook the peculiarities of the problem. * * * Radical as he is, Letourneau admits that 'even today in most civilized countries a rigid, almost hieratic formalism still accompanies the administration of justice, *and certainly influences the mind of both judges and judged.*'" Ross, Social Control, 113. See also Ross, Foundations of Sociology, 130.

tration of a charity than as a judicial body charged with the construction and the administration of a legislative act."[169] This is even more true where decision of controverted questions of fact is involved. A rational method of determining such questions is no more to be attained by turning them over to the unfettered common sense of a lay magistrate than by the other extreme of imposing an unreasonable burden of technical rules upon the trained judge. Yet if we are to go to extremes, the advantage lies with judicial justice, however hampered, since, at least, its course may be predicted and the technical rules which obstruct its course may be mastered. In a modern state, executive justice, beyond what is involved in a proper balance between law and administration, is an evil, even if sometimes a necessary evil. It has always been, and in the long run it always will be crude and as variable as the personalities of officials. No one can long be suffered to wield the royal power of deciding without fixed principles according to convictions of right but one trained to subordinate impulse and will to reason, disciplined in the exercise of reason and experienced in the difficult art of deciding controversies. If we did not know it, legal history could teach us that no one may be trusted to dispense with rules but one who knows the rules thoroughly and knows how to apply them on occasion. Hence time has always imposed a legal yoke upon executive justice and has turned administrative tribunals into ordinary courts.[170] A law-ridden people, finding that, in a time which demands positive action, the legal system furnishes only checks and safeguards, may for a time throw over justice according to law and seek relief outside of the law. But so used justice without law can be no more than a temporary expedient in

[169]Bohlen, Workmen's Compensation (Address before the Law Association of Philadelphia, 1912) 34. See Friedensburg, The Practical Results of Workingmen's Insurance in Germany (Gray's transl.) 1911.

[170]This is becoming apparent today in the decisions of American public utility commissions. Perhaps the most notable instance is to be seen in the decisions of the Railway Commission of Wisconsin. The reports of these decisions have all the air of ordinary law reports. The commission bases its decisions largely upon its past decisions as precedents and obviously is building up a body of principles which will soon make of it simply an ordinary court. In New York also the decisions of public utility commissions are tending in the same direction.

See also Smithers, Executive Clemency in Pennsylvania. This book shows strikingly how executive discretion in a subject which should not be a matter of rule may develop rules through repeated decision of similar cases. The attempt to reduce the pardoning power to rules in this particular instance may be in part attributable to the mistaken tendency of the nineteenth-century lawyer to reduce everything to rule. Evidently, however, public dissatisfaction with arbitrary executive exercise of the power has also been a factor.

the world of today. Modern constitutions do more than reflect eighteenth-century political theory when they forbid executive justice and provide for judicial determination of the limits of executive action.[171] These provisions reflect experience of many peoples under most diverse conditions. It is no accident that France, which was the first country to develop modern administration, is more and more turning its administrative tribunals into ordinary courts.[172]

V. Judicial Justice.[173]

Administration of justice according to law is not necessarily judicial administration of justice. There may be administration of justice by lay magistrates who combine judicial with administrative powers, by lay magistrates whose powers are solely or at

[171]Austria gives the Imperial Court (*Reichsgericht*) jurisdiction over conflicts between judicial and administrative authorities as to whether a matter is of judicial or administrative cognizance. Fundamental Law concerning the Establishment of an Imperial Court, art. 2 (Dodd, Modern Constitutions, I, 84). *Cf.* "Justice shall be separated from administration in every case." Fundamental Law concerning the Judicial Power, art. 14 (Dodd, I, 87). In addition to a provision for separation of powers in art. 15, the Constitution of Brazil provides (art. 79) that "a citizen vested with functions belonging to one of the three federal powers shall not exercise those belonging to the other two." (Dodd, I, 153, 176). The constitution of Chili (art. 99) provides for complete separation of the judicial function: "The power to try civil and criminal cases shall belong exclusively to the courts established by law. Neither Congress nor the President of the Republic shall in any case exercise judicial functions, remove pending cases to a superior court or revive cases already decided." (Dodd, I, 253). The constitution of Denmark, after a general provision as to separation of powers (art. 2) provides expressly that "the judicial power shall be distinct from the executive power, in accordance with rules to be established by law." (Dodd, I, 267, 277). The constitution of Mexico along with a provision for separation of powers (art. 50) has a special provision (art. 21) against executive punitive justice (Dodd, II, 44, 51). As to the experience of Colonial America with executive justice, see Warren, History of the American Bar, 136; Noble v. Mait, Pennypacker, Pennsylvania Colonial Cases, 27; Tanner, The Province of New Jersey (Columbia University Studies in History, Economics and Public Law, vol. 30) chap. 23, especially pp. 500 *et seq.*; Fisher, New Jersey as a Royal Province (Columbia University Studies in History, Economics and Public Law, vol. 41) chap. 8.

[172]Duguit, Les Transformations du droit public, chap. 5, § 7; Parker, State and Official Liability, 19 Harvard Law Rev. 335.

[173]Bluntschli, Theory of the State (3rd Oxford ed.) 523; Lieber, Civil Liberty and Self Government, chaps. 18, 19; Burgess, Political Science and Constitutional Law, II, 356-366; Baldwin, The American Judiciary, 1-98; Brown, Judicial Independence, Rep. Am. Bar Ass'n, XII, 265; Root, Judicial Decisions and Public Feeling, Rep. New York State Bar Ass'n, XXXV, 148; Pound, Social Problems and the Courts, 18 Am. Journ. Sociol. 331 (also in Proc. Nat. Conf. Charities and Corrections at Cleveland, June, 1912).

least chiefly judicial, by professional lawyers taken from the bar to be judges, as in England and America, or by specialists in judicial administration, trained for that career from the beginning, as in Continental Europe. As has been seen,[174] setting off of the judicial function has been a gradual process, and the Roman polity to the end confided judicial power to the ordinary magistrates. But the advantages of justice according to law are best secured by judicial justice. This is true especially of that most important advantage of justice according to law that it insures that the more valuable ultimate interests, social and individual, will not be sacrificed to immediate interests which are more obvious and pressing but of less real weight. It is not too much to say that this advantage of justice according to law depends upon judges who are independent, trained to adhere to principles and to be governed by legal reason rather than by interest or external pressure and watched narrowly by a learned profession, trained in the same tradition, which has at hand the materials for searching criticism of every decision.

Objections to judicial justice to-day[175] are chiefly directed to the law-making or law-declaring function of judges. That function must be considered more fully in other connections.[176] But it must be insisted that the functions of finding the law, interpreting the law and applying the law cannot be separated.[177] Hence

[174] *Ante*, III, Legislative Justice.

[175] Roe, Our Judicial Oligarchy; Ransom, Majority Rule and the Judiciary; Manahan, Argument upon the Recall of Judges, Proc. Minn. State Bar Ass'n, 1911, 112; Poindexter, The Recall of Judges, Senate Document No. 472, March 28, 1912; Gompers, Labor's Reasons for the Enactment of the Wilson Anti-Injunction Bill, Senate Document No. 440, March 19, 1912; Roosevelt, The Right of the People to Rule, Senate Document No. 473, March 28, 1912; Owen, The Recall of Judges, 21 Yale Law Journ. 655; Dodd, The Recall and the Political Responsibility of Judges, 10 Michigan Law Rev. 79; Roe, The Recall of Judges, Proc. Acad. Pol. Sci. in the City of New York, III, 93; Wanamaker, The Recall of Judges, Proc. Ill. State Bar Ass'n, 1912, 174, Proc. Mo. Bar Ass'n, 1912, 147; Connolly, Big Business and the Bench, Everybody's, February and March, 1912.

[176] See my papers, Social Problems and the Courts, Amer. Journ. Sociology, 1912, XVIII, 331, and Legislation as a Social Function, Publications of Amer. Sociological Soc'y, 1912, VII, 148.

[177] "The judicial (*richterliche*) power is often regarded as the power which judges (*urteilen*)—A confusion which is favored by the French [and English] expressions (*pouvoir judiciaire*). But the essence of judicial power consists not in judging (*urteilen*), but in laying down the law (*richten*), or, according to the Roman expression, not *in iudicio* but *in iure*. 'Judging,' in the sense of recognizing and declaring the justice in particular cases, is not necessarily a function of government, nor the exercise of a public power. In Rome it was commonly entrusted to private persons as *iudices*, in medieval Germany to the assessors

objections which are made to every phase of judicial administration of justice may be taken up together.

It has always been urged against judicial justice that it is too rigid, too hard and fast; that it trusts too much to rule and does not allow sufficient play to the non-legal conscience in the ascertaining or in the applying of the law. This complaint is made with respect both to the deciding and to the law-declaring function, as exercised by judges. In each case, it is urged, judges are governed too much by logical deduction. This is only another form of one of the stock complaints against justice according to law, and comes really to the proposition that judicial justice realizes justice according to law most completely and so brings out its defects as well as its excellencies. The tendency in the United States to-day is to temper judicial exercise of the deciding function by conceding extravagant powers to juries,[178] and there are signs of a tendency to temper judicial exercise of the law-declaring function by devices for popular review of decisions. This is a reaction toward justice without law. The mechanical jurisprudence to which scholars in the other social sciences so justly take exception to-day is not inherent in judicial justice. It grows out of the attempt in the nineteenth century to reduce everything to detailed rule, which went on in legislation as well as in judicial decision, and is characteristic of the stage which I have called the maturity of law. Elsewhere this is recognized, and the remedy is sought, not in reversion to justice without law, but in newer theories of justice and newer theories of judicial application of law.[179] Indeed it is significant that American critics, who rightly deplore the attitude toward social legislation to which a jurisprudence of conceptions led many American courts at the end of the last century, and would seek a remedy in the antiquated devices of fictions and spurious interpretation, are yet so far under the influence of the same mechanical ideas as to object to decisions

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(*Schöffen*), not the judges (*Richter*). In modern times it is often entrusted to popular juries. Maintaining the law, on the other hand, and protecting the rights of individuals and of the community, has always been considered as a magisterial function." Bluntschli, Theory of the State (3rd Oxford ed.) 523. See Gray, Nature and Sources of Law, § 370.

[178] See Brown, Judicial Independence, Rep. Am. Bar Ass'n. XII, 265, 273. Compare recent statutes introducing the idea of comparative negligence, and leaving the matter to the jury. Wis. Laws of 1907, c. 254; Nev. Laws of 1907, c. 214; N. D. Laws of 1907, c. 203; S. D. Laws of 1907, c. 219. See also U. S. Stat. at Large, c. 149, § 3 (1908).

[179] See Rogge, Methodologische Vorstudien zu einer Kritik des Rechts (1911).

which employ ordinary canons of genuine interpretation, as involving judicial usurpation and allowing too much freedom of judicial action.[180]

The criticism of judicial justice just considered is directed to method. But objection is made also to the premises employed in judicial justice. It is urged that they are too narrow and pedantic and that the fundamental principles are too fixed; so that judicial justice is too slow in responding to changes in the environment in which it must operate.[181] This is the theoretical basis of a tendency in the United States at present to take away from the courts matters in which social workers are vitally interested in which new premises are demanded, both as the basis of law-making and as the measure of application of legal standards.[182] In part also this feature of judicial justice is taken as the justification of a tendency to attempt control of judicial application of law by minute and detailed legislation. But this fixity of premises is not wholly a defect. If tradition sometimes holds too fast, yet it holds fast and so makes judicial justice uniform and predicable. Stability is at least no less important than power of growth.[183] The tradi-

[180] *E.g.*, see McCarthy, The Wisconsin Idea, chap. 9, especially p. 268.

[181] This sort of criticism is not confined to America. See Schwering, Das Grundproblem der Rechtsreform (1911) 5 *et seq.*

[182] For instance, prison associations are proposing statutes requiring formal imposition of the maximum statutory sentence by the trial court and leaving the whole question of the actual duration of confinement to an administrative commission. With respect to the operation of such legislation see the remarks of Reese, C. J., and Letton, J., in Williams v. State (1912) 91 Neb. 605, 609, 610. Judge Reese says, "Those men were accused of receiving stolen property. The value of the property was found in one case to be $35.50 and in the other $36. The statute provides imprisonment of from one to seven years as the penalty for receiving stolen goods of the value of $35 or upwards. In each case the sentence is for that indeterminate term. Were the parties strangers and without friends who would become interested in their behalf, they might remain in prison for the full seven years. A cruel and unjust punishment, and yet beyond the power of the court to afford them justice, while no greater punishment would be imposed upon one who had received stolen property of the value of thousands of dollars." Judge Letton says, "I trust, however, that the legislature will remedy the obvious defect in the statute which permits the possibility of an unlearned or penniless convict remaining confined for the maximum term for the sole reason that he is unable to prepare and present for himself an application for release at an earlier time or to employ counsel for that purpose."

[183] "It seeks for a certain permanence of human relations. It procures for human beings a pause for rest in the midst of the struggle for existence. * * * It follows that the politics of law (*Rechtspolitik*) must be distinguished from everyday politics. The latter is unstable, and continually brings forth new movements. But the former makes possible a gradual peaceful prosperity." Leonhard, The Vocation of America for the Science of Roman Law, 26 Harvard Law Rev. 389, 405.

tional element in law ought to grow and it does grow. But growth takes place chiefly in the maturity of law by working out the results of principles which are found in the traditional materials by analysis and by discovering through judicial experience the applications of those principles which will subserve the ends of justice. It must be remembered that any attempt to set up new premises on a large scale by judicial law-making unduly impairs the stability of law. Juristic and judicial development of law proceed by analogical reasoning, that is, in effect, by choice between competing analogies based on the principles of the received tradition. New premises, furnishing new analogies, unsettle more or less the whole legal system. Juristic new starts, therefore, are usually the result of some sort of revolution, such as a code[184] or a reversion to justice without law and consequent reception of ideas from without. But stability is required much more in some parts of the law than in others. New premises are not all that we need to-day. Quite as much we need to distinguish what must be stable and what must be fluid in the principles by which justice is administered. It is in that part which must be fluid that new premises for judicial justice are chiefly demanded.

A third objection to judicial justice is that it has been characterized by a tendency to reduce to rule, along with those things which demand rule, those with respect to which detailed rules are not practicable. Thus in the nineteenth century courts sought to reduce the details of procedure, evidence, administrative law and the law as to negligence to chapter and verse of strict rule. But this is a tendency of the nineteenth century in every department of law and of politics. The New York code of civil procedure went far beyond any judicial decision in the attempt to subject every detail of judicial action to fixed rule. Legislation has tied down administration quite as tight as judicial decision has sought to do.[185] The attempt of the courts in the last century to reduce

[184] See Cosack, Lehrbuch des deutschen bürgerlichen Rechts, I, § 7; Schwering, Das Grundproblem der Rechtsreform. 1.

[185] "The administration of the police department has been hampered by mandatory state legislation controlling administrative routine. This is inimical to efficiency and subversive of discipline. State laws at present deal with the organization of the department, its different ranks, grades, salaries, qualifications for appointment and promotions, manner of distribution of the force, platoons and tours, structure and quota of the detective bureau, traffic squad, the suspension, trial and punishment of delinquent policemen, etc. All such matters should be left entirely to local authorities." Preliminary Legislative Report of Special Committee of the Board of Aldermen of the City of New York, Appointed to Investigate the Police Department, Pursuant to Resolution Dated August 5, 1912, 3-4.

everything to rule only represents one phase of the mechanical thinking which characterizes all the social sciences during that period.

Legislative justice and executive justice fail in two respects. In that part of judicial administration in which rule is necessary, they are not governed by rule or they do not apply rule uniformly, consistently and intelligently. In that part in which discretion is necessary, trained reason and disciplined judgment are required, and the mental habits of those whose primary function is to deal with political rather than judicial questions, are such as to make wide judicial discretion intolerable in their hands. On the other hand, legislative and administrative officers lose in efficiency if they have in too large measure the mental habits of the judge. The experience that crystallized in the nineteenth-century abhorrence of discretion was primarily experience of executive and legislative justice. It affords no argument against free judicial justice in that part of the law which requires a large margin of free discretion.

Turning to the advantages of judicial justice, in the first place, with respect both to the law-declaring and to the deciding function, it combines the possibilities of certainty and of flexibility better than any other form of administering justice. It provides for certainty through the training of the judge in logical development and systematic exposition of legal principles. It provides for growth by permitting a scientific testing of principles with reference to concrete causes and correction of rules through experience of their application and a gradual process of inclusion and exclusion upon rational principles.

Secondly, there are checks upon the judge which do not obtain or are ineffective as to legislative and executive officers. Three such checks are of especial importance: (1) The judge, from his very training, is impelled to conform his action to certain, known standards. Professional habit leads him in every case to seek such standards before acting and to refer his action thereto. (2) Every decision is subject to criticism by a learned profession, to whose opinion the judge, as a member of the profession, is keenly sensitive. (3) Every decision and the case on which it was based, appear in full in public records. Moreover in the case of appellate courts all important decisions and the grounds thereof and reasons therefor are published in the law reports, so that materials for accurate judgment upon judicial decisions are always available and readily accessible.

Where wide discretion is involved, as in juvenile courts, in courts of domestic relations, and in attempts to individualize penalties, the two checks last mentioned are of the highest value. For while the sympathetic magisterial adjustment of relations of family life and the adjustments of punitive justice to the individual wrongdoer, on which we are now insisting so much, call for a very large discretion, they involve matters more tender than any others that can come before tribunals. The powers of the Court of Star Chamber extended only to misdemeanors, punishable by fine, imprisonment or pillory, and in their possibilities of affecting the dearest interests of the ordinary man were a trifle compared with those of American juvenile courts and courts of domestic relations and with those which many are seeking to confer upon administrative boards after conviction and sentence. If those tribunals chose to act arbitrarily and oppressively, they could cause a revolution quite as easily as did the former. The chief, if not the only, security we have for the proper exercise of such powers are the trained reason and habit of seeking principles, even while using discretion in applying them, which characterize judicial justice, and the sensitiveness of judges to expert criticism from the bar. Such tribunals call for the strongest judges we can put upon the bench.[186] But even with inferior judges, the checks which are peculiar to judicial justice may make them tolerable where they would be intolerable if made up of administrative officers. How effectively these checks may operate in practice is shown well in the worst period of judicial administration in English law, the period of the politics-ridden bench of Charles II and James II. As a result of the purely legal development begun by Coke a generation before, "crudities which Matthew Hale permitted under the Commonwealth, Scroggs refused, under James II."[187]

A third advantage of judicial justice is that because of their training in the law, their habit of seeking and applying principles whenever called upon to act, and their consciousness that their decisions will be preserved in permanent form and will be subject to expert criticism in the future, as well as to popular criticism in the present, judges will stand for the law against excitement and clamor. Chiefly because training and consciousness that the

[186]See the remarks of Frick, J., in Mills *v.* Brown (1907) 31 Utah, 473, 486-488, and the testimony of Judge Pinckney, quoted in Breckinridge and Abbott, The Delinquent Child and the Home, 202 *et seq.*

[187]Wigmore, Evidence, I, § 8.

soundness or unsoundness of decisions will be apparent to the bar at once in ordinary cases and will be discussed by writers and teachers in unusual cases operate both as a check and as a stimulus. judicial justice has always proved the surest agency of enforcing the law in the face of opposition. The "legislative lynchings" of loyalists during and after the Revolution[188] should be compared with the steadfastness with which judges protected them in their legal rights even when threatened with popular vengeance.[189] The legislative and executive treatment of Uitlanders in the South African Republic should be compared with the firm stand for law taken by Chief Justice Kotzé, in the face of arbitrary interference by the president.[190] With us, in states in which there is local opposition to prohibition laws, suits in equity to abate a public nuisance are a recognized and effective mode of doing what administrative officers and juries will not or dare not do.[191] Juries are easy-going[192] and even cowardly[193] where judges may be counted on to enforce the established law. Indeed juries are usually invoked to defeat the enforcement of laws which are locally unpopu-

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[188]*Ante*, IV, Executive Justice, notes 152, 153, 157.

[189]Rutgers v. Waddington (1784) 1 Thayer Cas. Const. L. 63; Den d. Bayard v. Singleton (N. C. 1787) 1 Martin 42. Another instance may be seen in the firm resistance of the Court of Appeals of Kentucky to the attempt of the legislature to require creditors to accept payment of debts in depreciated paper by a retroactive statute. While the constitutionality of the statutes was before the court "threats of legislative vengeance and popular revolution were freely indulged in for the purpose of influencing that tribunal—but all in vain." The controversy raged in Kentucky from 1821 to 1826 and the legislature not only attempted to remove one of the judges of the Circuit Court but attempted to abolish the Court of Appeals and to set up a new court in its stead. See Doolan, The Old Court-New Court Controversy, 11 Green Bag, 177. About the same time the legislature of Mississippi attempted to make a law operate retrospectively. The Circuit Court and on appeal the Supreme Court refused to give the statute retroactive operation. Thereupon the legislature in 1825, by resolution required the judges to appear at the bar of the House of Representatives and "show cause why they should not be removed from office in consequence of their decision in regard to the 'Debtor's Act.'" Lynch, Bench and Bar of Mississippi, 92-93; Somerville, Sketch of the Supreme Court of Mississippi, 11 Green Bag 503, 505. Popular excitement ran high in each case and the judges were violently denounced. In each case time has vindicated their decisions.

[190]Brown v. Leyds (High Court of the South African Republic, 1896) 14 Cape Law Journ. 71, 94; The Judiciary and the Legislature, 14 Cape Law Journ. 109; The Judicial Crisis in the Transvaal, 14 Law Quart. Rev. 343.

[191]See Littleton v. Fritz (1885) 65 Ia. 488.

[192]See remarks of Mr. Holt, Proceedings of the First National Conference on Criminal Law and Criminology, 122-123.

[193]For lay testimony as to this, see Mark Twain, Adventures of Huckleberry Finn, chap. 22; Roughing It, II, chap. 8.

lar.[194] Juries have stood up for moral ideas against the law; but cases are rare in which they have stood up for moral ideas and for law against local interest or popular clamor. Such cases as the enforcement of the fugitive slave law by state courts in the North just prior to the Civil War are significant.[195] The judges of these courts were abused for enforcing that law, as required of them by the federal constitution, by those who equally denounced secession.[196] Not a little of the current denunciation of judges proceeds from those who do not wish the law to operate equally and exactly but wish to see it warped in their favor and resent judicial resistance to pressure under which administrative officers would yield.[197]

If American courts in the past era of commercialized politics are compared with the legislative and administrative departments of our governments, it will be seen that despite the very general subjection of the bench to politics involved in an elective short-term judiciary, despite the false democracy of the period immediately after the Revolution which insisted the law should not be a profession and sought to make it a trade open to all,[198] and despite the reluctance of legislators even now to permit the exaction of any adequate education from those who are admitted to practice law, the bench has been by far the soundest of our institutions.[199] Because of this, there is a disposition to demand from it the impossible. What has been and often unhappily still is regarded as venial in an administrative officer, and what is treated as a matter of course in a legislator, is ground for impeachment in a judge. Sporadic cases of judicial misconduct, therefore, attract attention far beyond their relative significance. Moreover

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[194]The Chicago Sunday Closing prosecutions in 1908 are a typical example. The judges charged in accordance with law, against local feeling, but the jurors regularly found verdicts against undoubted fact and the clear terms of the state law.

[195]Sims' Case (Mass. 1851) 7 Cush. 285. For a full account of all the proceedings, see the Case of Thomas Sims, 14 Monthly Law Reporter, 1.

[196]See The Removal of Judge Loring, 18 Monthly Law Reporter, 1. Also the account of the defeat of Judge Loring's re-appointment as lecturer in Harvard Law School, because he had enforced the law as United States Commissioner, in Warren, History of Harvard Law School, II, chap. 33.

[197]"I told a labor leader once that what they asked was favor, and if a decision was against them they called it wicked. The same might be said of their opponents." Mr. Justice Holmes, Speech before the Harvard Law School Association of New York, February 15, 1913. Senate Document No. 1106, p. 4.

[198]See Warren, History of the American Bar, chap. 10.

[199]Bryce, American Commonwealth, chap. 105.

the traditions of bench and bar forbid the judge's defending himself in print or engaging in acrimonious controversy over his "record" as political officers may and do defend themselves. Hence misrepresentations of judicial decisions remain uncontradicted[200] and inaccurate or distorted versions of the law, as declared by judges, gain credence in quarters where one would look for more critical scrutiny of the facts.[201] On the whole, our courts have

[200]The papers of Mr. Connolly entitled Big Business and the Bench are often cited, although it has been shown that the data upon which the reckless assertions made therein profess to proceed are garbled and even falsified. Wigmore, Do We Need the Legal Muckraker, Journ. of the Amer. Inst. of Criminal Law and Criminology, III, 3. Even more striking is the well-known case where a prisoner who had served fifteen years in the Western Penitentiary at Pittsburg was pardoned, pensioned by a philanthropist, and "heralded as innocent." On the faith of press reports, judicial administration of justice has been severely criticized in connection with this case. On investigation by a committee of the American Prison Congress, however, it turned out to be simply an ordinary case of pardon. The report continues: "The writer has for some years made it a practice to follow up with correspondence or otherwise the most widely published and sensational accounts of hardships experienced by innocent persons under judicial conviction, and has been surprised at the meager basis upon which such reports rest, though he finds that they are generally given credence by the reading public." Journ. of the American Inst. of Criminal Law and Criminology, III, 132. The classical instances of judicial perversion of justice in the popular mind are the administration of justice by Lord Chief Justice Jeffreys, the trial of Nuncomar before Sir Elijah Impey, and the trial of Lord Cochrane before Lord Ellenborough. In each case critical, sober investigation of the facts has shown that the popular impression is quite unfounded. Historians who examined Jeffreys at first hand have been able to recognize a lawyer and a judge through the clouds of dust kicked up by political controversy and have vindicated the judges of the Stuarts from the vigorous misrepresentation of Macaulay and the credulous partisanship of Lord Campbell. See Zane, The Five Ages of the Bench and Bar of England, Select Essays in Anglo-American Legal History, I, 525, 705, 708. Irving, The Life of Judge Jeffreys (1898). The trial of Nuncomar has been examined critically with reference to the original sources by Sir James Stephen with the result that the conduct of the trial judge has been completely vindicated. Stephen, Nuncomar and Impey. Likewise examination of the records, testimony and contemporary evidence has amply vindicated the conduct of Lord Ellenborough at the trial of Lord Cochrane. Atlay, Lord Cochrane's Trial before Lord Ellenborough. Still another case which has been the subject of a great deal of unfounded criticism in recent periodicals is Taylor *v.* Means (1913) 139 Ga. 578. It is usually stated in the press that in this case a boy of eleven years was sentenced to imprisonment for eleven years for stealing a five-cent bottle of Coca Cola. As a matter of fact the boy in question was incorrigible, had previously been put upon probation without statisfactory results and was committed to an industrial school for a period not longer than minority exactly as children are committed in juvenile courts in other States. See a full account of this case in the West Publishing Company's Docket for June 1913, p. 984.

[201]Thus, the most extreme statements are commonly made as to the fellow-servant rule, assuming that the decisions in one or two states may be made to stand for all our jurisdictions. See, for example, Wilson, The New Freedom, 12 World's Work, 253, 257 (January, 1913). Here,

the best constructive record of any of our institutions. When our judicial systems were set up after the Revolution, the system of equity had not yet crystallized in England and the absorption of the law merchant into the common law was still incomplete. Our courts had to develop equity and take over the law merchant parallel with the English courts; they had to test the common law at every point with respect to its applicability in America, they had to develop an American common law, a body of judicially-declared principles suitable to America, out of the old English cases and the old English statutes. All this they did and did thoroughly in about three-quarters of a century.[202] No other judicial achievement may be found to compare with this. Moreover it is not likely that any of the work of legislation or administration during the same time will prove so lasting.

The present discredit of judicial justice in the United States may be referred in part to causes that operate only in this country. Some of these are, our attempt to make law do the work of administration, our curtailing of judicial independence and putting courts into politics, the archaic organization of our courts and our neglect of organization and training of the bar.[203] Partly also it is to be referred to causes which operate throughout the world. Such causes are the purely mechanical conception of the judicial office and the resulting mechanical administration of justice, and the call of the time for new premises both in law-making and in application of law, without any agreement as to what those premises should be. It might be asserted that the latter, being universal, are manifestations of serious inherent defects in judicial justice. Hence they require more thorough examination.

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in addressing a sermon to judges, upon the basis of a statement true only of four states, but partially true as to them, and wholly untrue of all our other states, the judge-made doctrine as to the duty of the master to furnish reasonably safe appliances and the progress which courts have made in all but four states in chiseling away the fellow-servant rule to meet the circumstances of modern industrial plants are wholly ignored. "Most laymen believe all law to be so absurd that no doctrine in or about it can be too absurd to be probable." Pollock, Judicial Records, 29 Law Quart. Rev. 205, 215.

[202] This is well set forth in the opinion of Parker, C.J., in Pierce *v.* State (1843) 13 N. H. 536, 557. See also Warren, History of the American Bar, chaps. 10, 11.

[203] See my papers, The Causes of Dissatisfaction with the Administration of Justice, Rep. Am. Bar Ass'n, XXIX, 395; 40 American Law Rev. 729; Inherent and Acquired Difficulties in the Administration of Punitive Justice, Proc. Am. Pol. Sci. Ass'n, IV, 222; The Organization of Courts (Address before the Law Ass'n of Philadelphia, Jan. 1913) Legal Intelligencer, XXII, No. 6, p. 1; The Administration of Justice in the Modern City, 26 Harvard Law Rev. 302.

While it has been carried to an extreme in the United States, especially in procedure, the idea that a court must be a judicial slot machine[204] and that a bureau of justice would be unjudicial flows from the attempt of the nineteenth century to make everything go by rule. It results from taking the law of property and the law of commercial transactions as the type to which everything is to be made to conform. It was not the idea of the classical Roman law.[205] It was not the idea of the great judges who laid the foundations of the common law.[206] It was not the idea of the English chancellors.[207] The notion that the judicial function is the umpire's function only is one that appears in certain stages of legal development, but is not in the least inherent in the conception of judicial justice. It is appropriate to the first stage of legal development, along with mechanical modes of trial, formalism and inflexible procedure. It was congenial to purely agricultural communities in the United States during the first half of the last century, where the farmer, remote from the distractions of city life, found his theater in the court house.[208] Above all it was congenial to the ultra-individualist justice of the nineteenth century. Already juvenile courts, courts of domestic relations, and the success of the Municipal Court of Chicago as a bureau of justice[209] are showing us that courts have wider possibilities, and the demand for the administrator-judge[210] has scarcely more than begun.

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[204]"The law is an automation * * * one puts in the case above and pulls out the decision below." Kantorowicz, Rechtswissenschaft und Soziologie, 5.

[205]"This ideal, which was foreign to the Romans in the best period, arose in the time of their deep political degradation under the rule of emperors who were likened to gods. * * * The centralized bureau-state of modern absolutism was first to put this Byzantine ideal into practice and to find the desired basis for it in Montesquieu's theory of separation of judicial and legislative power." Gnaeus Flavius (Kantorowicz), Der Kampf um die Rechtswissenschaft, 7.

[206]For example, specific relief had made some progress in the real actions and interpleader was developed in the action of detinue. The exigencies of trial by jury seem to have required the rigid procedure at common law which has come down to us today.

[207]*E.g.*, Lord Hardwicke in Paget v. Gee (1753) Ambler (Appendix) 807, 809-810.

[208]See Torrey, A Lawyer's Recollections, chap. 3.

[209]On the Municipal Court of Chicago as a Bureau of Justice, see Fifth Annual Report of the Municipal Court of Chicago, 71-72; Journ. of the Amer. Inst. of Criminal Law and Criminology, III, 825.

[210]Pound, The Administration of Justice in the Modern City, 26 Harvard Law Rev. 302, 321 *et seq.*; Organization of Courts (Address before the Law Ass'n of Philadelphia, 1913).

But the call of the time for new premises both in law-making and in the application of law and the difficulties which the law encounters in responding thereto are factors of much more moment in the present distrust of courts."[211] To the practical American, taught that law is law because the courts so decide, it may well seem clear enough, when the law lags in the social movements that are going on all about us, that the fault must lie with the courts. That he does assume this is shown by the vogue of crude schemes for overhauling our judicial organization, the currency of so-called reforms of the courts which disregard all judicial experience and legal history and the popularity of the legal muckraker whose garbled accounts of decisions would not have been able to find a publisher a generation ago. In other lands, however, where the courts have no such rôle in the process of government as they have with us, the problem of making the law an effective social instrument, a means of achieving social progress, is quite as real as with us. On the Continent, under the influence of Roman law ideas, the courts or judges are not thought of as depositaries or as oracles of the law. Whereas we say a rule is law because the courts apply it in the decision of causes, they say upon the Continent that the courts apply the rule in the decision of causes because it is law. And yet socializing of the law is a problem the world over. A whole literature upon this subject has sprung up in Germany and in France."[212] Our situation in America is in no way unique; and if it is more acute, the reason is to be found in our eighteenth-century system of checks and balances, in the legal, political and philosophical charts called bills of rights by which our fathers sought to confine courts and legislatures and sovereign peoples for all time within the straight and narrow course of individualist natural law.

For a time there was need of propagandist agitation. It was necessary that the public, the legal profession and the courts be made to recognize that our legal system was to be re-examined, many of its fundamental principles recast, and the whole readjusted to proceed along new lines. This task of awakening has been achieved."[213] A generation ago it would have been hard

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[211]The substance of the remainder of this section was contained in the paper entitled Social Problems and the Courts referred to in note 173, *ante*.

[212]Stein, Die soziale Frage im Lichte der Philosophie, (2nd ed.) 457-496; Picard, Le droit pur, §§ 186-197 (1910).

[213]See Warren, The Progressiveness of the United States Supreme Court, 13 Columbia Law Rev. 294; Greeley, The Changing Attitude of the Courts toward Social Legislation, 5 Illinois Law Rev. 222.

to find anyone to question that, upon the whole, American law was quite what it should be. Some of the older members of the bar, indeed, still cherish the belief which was then universal. But first the economists and sociologists and students of government and then the bar itself have been thinking upon this matter freely and vigorously until criticism has become staple. Nowhere is this change more noticeable than in the reports and proceedings of our bar associations. Not long ago the dominant note was one of eulogy, of pride in our system and in its administration, and complacent comparison with what we took to be the legal systems of other peoples. To-day each volume of such proceedings is filled with critical comments upon every side of the law and of its administration and the more conservative are content with a tone of apology or with deprecating extravagant criticism. The need for propaganda has passed. Now for a season we need careful diagnosis and thorough-going study of the lines upon which change is to proceed. A change in juridical fundamentals must begin at the beginning. The problem of the sociological jurist lies far deeper than individual courts or judges, and deeper than lawyers and courts and judges collectively.

Legal history shows that from time to time legal systems have to be remade, and that this new birth of a body of law takes place through the infusion into the legal system of something from without. A purely professional development of law, which is necessary in the long run, has certain disadvantages, and the undue rigidity to which it gives rise must be set off from time to time by receiving into the legal system ideas developed outside of legal thought. Such a process has taken place twice in the history of our own law. In the sixteenth and seventeeth centuries the common law, through purely professional development in the King's Courts, had become so systematic and logical and rigid that it took no account of the moral aspects of causes to which it was to be applied. With equal impartiality its rules fell upon the just and the unjust. The rise of the Court of Chancery and development of equity brought about an infusion of morals into the legal system, an infusion of the ethical notions of chancellors who were clergymen, not lawyers, and thus made over the whole law. Again in the eighteenth century the law had become so fixed and systematized by professional development as to be quite out of accord with a commercial age. As the sixteenth-century judge refused to hear of a purely moral question, asking simply, what is

the common law? so the eighteenth-century judge at first refused to hear of mercantile custom and commercial usage, and insisted upon the strict rules of the traditional law. But before the century was out, by the absorption of the law merchant, a great body of non-professional ideas, worked out by the experience of merchants, had been infused into the legal system and had created or made over whole departments of the law. To-day a like process is going on. The sixteenth-century judge, who rendered judgment upon a bond already paid because no formal release had been executed and refused to take account of the purely moral aspects of the creditor's conduct, the great judge in the eighteenth century who refused to allow the indorsee of a promissory note to sue upon it, because by the common law things in action were not transferable, and would not listen to the settled custom of merchants to transfer such notes nor to the statement of the London tradesmen as to the unhappy effect of such a ruling upon business, have their entire counterpart in the judges of one of the great courts of the United States in the twentieth century to whom the economic and sociological aspects of a question appear palpably irrelevant.[214]

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[214] The parallel is so close that it is worth pursuing. Addressing himself to a doctor of divinity, a serjeant at law of the reign of Henry VIII disposed of the purely moral aspect of allowing recovery upon a bond paid but not formally released, in these words: "in what uncertaintie shall the king's subjects stande, whan they shall be put from the lawe of the realme, and be compelled to be ordered by the discretion and conscience of one man! And namelie for as moch as conscience is a thinge of great uncertaintie: for some men thinke that if they treade upon two strawes that lye acrosse, that they ofende in conscience, and some man thinketh that if he lake money, and an other hath too moche, that he may take part of his with conscience; and so divers men divers conscience; for everie man knoweth not what conscience is so well as you Mr. Doctour." Hargrave, Law Tracts, (Dublin ed. 1787) 326.

In 1704, Lord Holt, when the question of negotiation of promissory notes was before him spoke of "the mighty ill consequences that it was *pretended* would ensue by obstructing this course," asked "why do not dealers use that way which is legal?" and proceeded to argue upon strict common-law grounds why the indorsement of a note could not be given effect. Buller *v.* Crips (1704) 6 Mod. 29.

In 1911, the Court of Appeals of New York, having a Workmen's Compensation Act before it, said: "The report of the commission is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally and legally unsound. Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be moulded into statutes without infringing upon the letter or spirit of our written constitutions." Ives *v.* South Buffalo R. Co. (1911) 201 N. Y. 271, 287.

The sixteenth- and seventeenth-century law was brought to take account of ethics. The eighteenth-century law came to receive the custom of merchants as part of the law of the land. May we not be confident that in the same way the law of the twentieth century will absorb the new economics and the social science of to-day and be made over thereby? For if the causes of the backwardness of the law with respect to social problems and the unsocial attitude of the law toward questions of great import in the modern community are to be found in the traditional element of the legal system, the surest means of deliverance are to be found there also. The infusion of morals into the law through the development of equity was not an achievement of legislation but the work of courts. The absorption of the usages of merchants into the law was not brought about by statutes, but by judicial decisions. When once the current of juristic thought and judicial decision is turned into the new course our Anglo-American method of judicial empiricism has always proved adequate. Given new premises, our common law has the means of developing them to meet the exigencies of justice and of molding the results into a scientific system. Moreover, it has the power of acquiring new premises, as it did in the development of equity, and the absorption of the law merchant, and as it is beginning to do once more to-day. For there are many signs that fundamental changes are taking place in our legal system and that a shifting is in progress from the individualist justice of the nineteenth century, which has passed so significantly by the name of legal justice, to the social justice of to-day.

Seven noteworthy changes in the law, in the spirit of recent ethics, recent philosophy and recent political thought, have been discussed in prior papers.[215] Stated summarily these are: limitations on the use of property or attempts to prevent the anti-social exercise of rights, limitations upon freedom of contract which are belying the famous individualist generalization of the nineteenth century that the growth of law is a progress from *status* to contract, limitations on the power of disposing of property, limitations on the power of the creditor or injured party to exact satisfaction, revival of the idea of liability without fault so as to shift

[215] See my papers. Social Problems and the Courts, Am. Journ. Sociology, XVIII, 331; Social Justice and Legal Justice (Address before the Allegheny County Bar Ass'n. April 5, 1912) reprinted 65 Central Law Journ. 455; The End of Law as Developed in Legal Rules and Doctrines, 27 Harvard Law Rev. 195.

the burden of injury without fault from the one upon whom it chances to fall to the enterprise to which the injury is incident, change of *res communes* and *res nullius* into *res publicae*, and abandonment of the old attitude of the law with respect to dependent members of the household. In all these cases, social interests are now chiefly regarded.

It is true many of the examples adduced are taken from legislation. It is true also that some of these legislative innovations upon the settled juridical ideas of the past two centuries have been resisted bitterly by some courts. Yet one may be confident that every one of them would stand in the highest court of the land and in a growing majority of our state courts to-day. Moreover, what is more important, many of the most significant examples are taken from judicial decisions. If, therefore, the ailment is in the traditional element of our legal system, the cure is going on there under our eyes. It is an infusion of social ideas into the traditional element of our law that we must bring about; and such an infusion is going on. The right course is not to tinker with our courts and without judicial organization in the hope of bringing about particular results in particular kinds of cases, at a sacrifice of all that we have learned from legal and judicial history. It is rather to provide a new set of premises, a new order of ideas in such form that the courts may use them and develop them into a modern system by judicial experience of actual causes. A body of law which will satisfy the social workers of to-day cannot be made of the ultra-individualist materials of eighteenth-century jurisprudence and nineteenth-century common law based thereon, no matter how judges are chosen or how, or how often, they are dismissed. What we should insist upon is not recall of judges, but recall of much of the juristic and judicial thinking of the last century.

In contrast with the juristic thinking of the immediate past, which started from the premise that the object of law was to secure individual interests and knew of social interests only as individual interests of the state or sovereign, the juristic thinking of the present must start from the proposition that individual interests are to be secured by law because and to the extent that they are social interests. There is a social interest in securing individual interests so far as securing them conduces to general security, security of institutions, and the general moral and social life of individuals. Hence while individual interests are one thing and social interests

another, the law, which is a social institution, really secures individual interests because of a social interest in so doing. Hence it would seem that no individual may claim to be secured in an interest that conflicts with any social interest unless he can show some countervailing social interest in so securing it—some social interest to outweigh that with which his individual interest conflicts. If we compare with the foregoing proposition the classical statement of Blackstone—

"Besides the public is in nothing so essentially interested as in securing to every individual his private rights"——[216]

and if, contrasting these, we bear in mind that the latter represents not only the legal thought of the past but the doctrines to which our fathers sought to hold us for all time by constitutional provisions, we shall see how long a road our legal system has to travel.

The judges may not in reason be asked to lead in the present transition. They must go with the main body, not with the advance guard, and with the main body only when it has attained reasonably fixed and settled conceptions. It is no ill sign that economists and sociologists are ahead of the law provided the law knows it. Let us remember that it was not so long ago that economists succeeded in converting all of us thoroughly to individualism,[217] and in confirming lawyers in the individualist ideas they had found in the classical books of the common law. They must not expect the courts to turn the law about in a moment. When we reflect how fundamental is the shifting from the old so-called legal justice to the new social justice, how uncertain the new lines are as yet on the one hand, and on the other hand how completely the change goes to the root of everything the courts do, we must recognize how futile it is to expect the courts to adjust our whole legal system to it overnight. In the hands even of zealous and friendly courts the adjustment must be tedious and painful. The fundamental difference between the law of the nineteenth century and the law of the period of legal development on which we have entered is not in the least due to the dominance of sinister interests over courts or lawyers or jurists. It is not due, the

[216] 1 Blackstone, Commentaries, 139.

[217] For example, the following passed for "advanced thought" twenty years ago: "Governments are being remanded, if not into the rubbish heap of the world's back yard, yet into a secondary and subordinate place. And whereas men have relied in the past on the sovereign and the statute book for order, safety, property, happiness, they are now fast coming to rely for them simply on themselves." Brooklyn Ethical Society, Man and the State, 521-522 (1892).

legal muckraker notwithstanding, to bad men in judicial office or to intentional enemies to society in high places at the bar. It is not a conflict between good men and bad. Instead it is an intellectual conflict. It is a war of ideas, not of men; a clash between old ideas and new ideas, a contest between the conceptions of our traditional law and modern juristic conceptions born of a new movement in all the social sciences. Study of fundamental problems, not reversion to justice without law through changes in the judicial establishment or referenda on judicial decisions, is the road to socialization of the law.[218]

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[218]See my address, Taught Law, Rep. Am. Bar Ass'n, XXXVII, 975, 977 (1912). Others are saying the same. Overstreet, Philosophy and Our Legal Situation, Journ. of Philosophy, Psychology and Scientific Methods, X, 113.

Pound, Roscoe. Justice according to law. Evening Post Job Printing Office, 1914. The Making of Modern Law: Legal Treatises, 1800–1926, link.gale.com/apps/doc/F0152467643/MOML?u=msu_law&sid=bookmark-MOML&pg=1. Accessed 15 Aug. 2024.